Supreme Court, U.S.
FILED

124 (1)

No. 08-1331 APR 22 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

IN THE

Supreme Court of the United States

MARK HYNES,

Petitioner,

v.

SONIDO, INC.,

Respondent.

On Petition For a Writ of Certiorari
To The State Of New York Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

ANATTA LEVINSKY*
JOSUE D. HERNANDEZ
LAW OFFICES OF
ANATTA LEVINSKY, P.C.
6924 Bay Parkway
Brooklyn, New York 11204
718-837-9700

* *Counsel of Record*

QUESTIONS PRESENTED FOR REVIEW

1. Did the State of New York Court of Appeals violate Petitioner's right to "due process of law," guaranteed by U.S.CONST. amend. XIV § 1, and "right to a jury trial" of all traditional common law issues, referenced in U.S.CONST. amend. VII, and which should be seen as guaranteed by U.S.CONST. amend IX, U.S.CONST. amend. X, and U.S.CONST. amend. XIV § 1, when it dismissed Petitioner's appeal from an order of the Supreme Court of the State of New York, Appellate Division, First Department, in which said Court used its power to determined issues of fact, acting as a fact finder, on an appeal of a summary judgment – violating of both statutorily prescribed procedure and precedent requiring the protection of the right to jury trial in such cases?

2. Did the State of New York Court of Appeals violate Petitioner's right to "right to a jury trial," referenced in U.S.CONST. amend. VII, and which should be seen as guaranteed by U.S.CONST. amend IX, U.S.CONST. amend. X, and U.S.CONST. amend. XIV § 1, and "due process of law," guaranteed by U.S.CONST. amend. XIV § 1 (particularly as to how said right relates to a New York State Constitutional right guaranteeing a trial by jury in a civil case), when it dismissed Petitioner's appeal of a Supreme Court of the State of New York, New York County grant of summary judgment in which the Judicial Hearing Officer explicitly stated on the record that he would determine issues of fact, acting as the fact finder?

3. Did the State of New York Court of Appeals violate Petitioner's right to "due process of law," guaranteed by U.S.CONST. amend. XIV § 1, when it dismissed Petitioner's appeal of the Supreme Court of the State

of New York, New York County's grant of summary judgment where said judgment was reached on an issue that was presented for the first time in the moving party's reply papers, and where the Motion Court did not permit Petitioner the statutorily prescribed notice period to reply, and denied Petitioner meaningful reply?

4. Did the State of New York Court of Appeals violate Petitioner's right to "due process of law," guaranteed by U.S.CONST. amend. XIV § 1, and did said Court also err in upholding a violation of such rights, when it dismissed Petitioner's appeal – stating that no substantial Federal Constitutional question was present on the case, when the above issues where presented?

LIST OF ALL PARTIES TO THE PROCEEDINGS BELLOW

Pursuant to Rule 14.1(b), the following are all of the parties appearing before this Honorable Court:

Appearing as the Petitioner before this Honorable Court, and having appeared as the Plaintiff before the Supreme Court of the State of New York, New York County; as the Plaintiff-Appellant before the Supreme Court of the State of New York, Appellate Division, First Department; and as the Appellant before the State of New York Court of Appeals: Mark Hynes.

Appearing as the Respondent before this Honorable Court, and having appeared as the Defendant before the Supreme Court of the State of New York, New York County; as the Defendant-Respondent before the Supreme Court of the State of New York, Appellate Division, First Department; and as the Respondent before the State of New York Court of Appeals: Sonido, Inc.

CORPORATE DISCLOSURE STATEMENT

Petitioner is not a Corporation and is therefore not required to make a statement pursuant to Rule 29.6.

Petitioner alleges, however, upon information and belief, that Respondent, Sonido, Inc., is a corporation with no parent or affiliate, and that Respondent has three subsidiaries: Jerry Masucci, Inc.; Fania All Stars, Inc.; and, Key Productions, Inc.

Petitioner has no information as to whether any publicly held company owns 10% or more of Respondent's stock.

TABLE OF CONTENTS

Page

Opinions Below.....1
Basis for Jurisdiction.....1
Applicable Provisions of Law.....2
Statement of the Case.....2
(A) Statement of the Facts.....2
(B) Proceedings in the Supreme Court of the State of New York, New York County.....5
(C) The Opinion of the Supreme Court of the State of New York, Appellate Division.....17
(D) The State of New York Court of Appeals Opinion and Decision.....20
Reasons for Allowance of the Writ.....22
I. Petitioner's right to a trial by jury, which should be seen as referenced in the Seventh Amendment, and guaranteed by the Ninth, Tenth and Fourteenth Amendments, was violated when the State Courts in question determined issues of fact, traditionally associated with the province of the jury at common law.....22
(A) The relationship between due process of law, the common law understanding of the jury's role in effectuating due process, and the Seventh Amendment.....23
(B) The right to a trial by jury of all triable issues, referenced in the Seventh Amendment, should also be seen as a guaranteed in actions before state courts by operation of the Fourteenth Amendment.....28
II. Petitioner was denied due process of law, guaranteed by Section One of

the Fourteenth Amendment, when the State Courts in question did not follow the State's own recognition of the right to trial in a civil case.....29

III. The Courts in question violated Petitioners right to due process of law in upholding a grant of summary judgment, which was reached on issues presented for the first time in Respondent's reply papers, and in otherwise failing to allow Petitioner meaningful response.....26

Conclusion.....31

Appendix

Appendix A (Opinion of the State of New York Court of Appeals, entered October 28, 2008).....1a

Appendix B (Opinion of the Supreme Court of the State of New York, Appellate Division, First Department, entered April 3, 2008).....2a

Appendix C (Order of the Supreme Court of the State of New York, New York County, entered February 5, 2007).....4a

Appendix D (Transcript of the proceedings before the Supreme Court of the State of New York, New York County, dated February 5, 2007).....6a

Appendix E (Decision of the Supreme Court of the State of New York, Appellate Division, First Department, entered July 15, 2008).....32a

Appendix F (Decision of the State of New York Court of Appeals denying reargument, dated January 22, 2008).....33a

Appendix G (applicable provisions of law).....34a

Appendix H (Record on Appeal).....36a
Appendix I (Brief for Plaintiff-Appellant).....44a
Appendix J (Reply Brief for Plaintiff-Appellant).....91a
Appendix K (Affirmation in Support of Motion for Reargument or Leave to Appeal).....117a
Appendix L (Memorandum of Law in Support of Motion for Reargument or Leave to Appeal).....122a
Appendix M (Notice of Appeal to the State of New York Court of Appeals).....126a
Appendix N (Notice of Motion for Leave to Appeal to the Court of Appeals).....129a
Appendix O (Comments Concerning Subject Matter Jurisdiction).....150a
Appendix P (Letter of the Clerk of the Court, State of New York Court of Appeals, notifying counsel of the Courts motion concerning subject matter jurisdiction).....169a
Appendix Q (Letter from Mark Hynes to Chief Justice Kay of the State of New York Court of Appeals, undated).....171a
Appendix R (Letter from Mark Hynes to Stuart M. Cohen, Clerk of the State of New York Court of Appeals, dated November 21, 2008).....175a

TABLE OF CITED AUTHORITIES

Cases:

Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572 (1986).....10

Barrett v. Huff, 6 A.D.3d 1164, 776 N.Y.S.2d 678 (4th Dep't 2004)....6, 7, 9, 12, 13
Bennis v. Michigan, 516 U.S. 442 (1996).....27
Bennett v. Butterworth, 52 U.S. (11 How.) 669 (1850).....26
Bingham v. New York City Transit Authority, 99 N.Y.2d 355, 756 N.Y.S.2d 129, 786 N.E.2d 28, (2003).....18
Breitung v. Canzano, 238 A.D.2d 901, 660 N.Y.S.2d 765 (4th Dep't 1997).....16
Brown v. U.S. Vanadium Corp., 198 A.D.2d 863, 604 N.Y.S.2d 432 (4th Dep't 1993).....6, 7, 9, 12, 13
Burnham v. Superior Court of California, County of Marin, 495 U.S. 604 (1990).....27
Buzard v. Houston, 119 U.S. 347 (1886).....26
Carver v. Jackson, 29 U.S. (4 Pet.) 1 (1830).....27
Clifford v. U.S., 136 F.3d 144, 329 U.S.App.D.C. 1 (D.C. Cir. 1998).....31
Closson v. Seaboard Sand & Gravel Corp., 238 A.D. 584, 265 N.Y.S. 160 (1st Dep't 1933).....23, 29
Dannasch v. Bifulco, 184 A.D.2d 415, 585 N.Y.S.2d 360 (1st Dep't 1992).....8, 11
Esteve v. Abad, 271 A.D. 725, 68 N.Y.S.2d 322 (1st Dep't 1947).....10, 19, 23, 29, 31
Falk v. Goodman, 7 N.Y.2d 87, 195 N.Y.S.2d 645,163 N.E.2d 871(1959).....7, 8, 11, 12, 15, 29
Fedoryszyn v. Weiss, 62 Misc.2d 889, 310 N.Y.S.2d 55 (Sup. Ct. 1970).....24
Fox Film Corp. v. Muller, 296 U.S. 207 (1935).....20, 22

Games v. Dunn, 39 U.S. (14 Pet.) 322 (1840).....27
Gerard v. Inglese, 11 A.D.2d 381, 206 N.Y.S.2d 879 (2d Dep't 1960).....14
Glow-Brite Elec. Service Corp. v. Frocol Restaurant Corp., 56 A.D.2d 909, 392 N.Y.S.2d 695, (2d Dep't 1977).....9
Gow v. Bingham, 57 Misc. 66, 107 N.Y.S. 1011 (Sup. Ct. 1907).....24
Graham by Graham v. Murphy, 135 A.D.2d 326, 525 N.Y.S.2d 414 (3d Dep't 1988).....16
Hagar v. Reclamation Dist. No. 108, 111 U.S. 701 (1884).....30
Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).....31
Hazelhurst v. Brita Products Co., 295 A.D.2d 240 744 N.Y.S.2d 31 (1st Dep't 2002).....18
Hipp v. Babin, 60 U.S. (19 How.) 271 (1857).....26
Hurd v. Lis, 126 A.D.2d 163, 513 N.Y.S.2d 278 (3d Dep't 1987).....6
Hurtado v. People of State of Cal., 110 U.S. 516 (1884).....25, 28, 30
Irmiyayeva v. Thompson, 296 A.D.2d 439, 745 N.Y.S.2d 199 (2d Dep't 2002).....18
Ives v. South Buffalo Ry. Co., 201 N.Y. 271, 94 N.E. 431, 34 L.R.A.N.S. 162, Am. Ann. Cas. 1912B, 156 (1911).....23
Killian v. Ebbinghaus, 110 U.S. 568 (1884).....26
Lewis v. Cocks, 90 U.S. (23 Wall.) 466 (1874).....26
Lumbermens Mut. Cas. Co. v. Morse Shoe Co.,

218 A.D.2d 624, 630 N.Y.S.2d
1003 (1st Dep't 1995).....8, 31
Magniac v. Thompson, 32 U.S. (7 Pet.) 348
(1833).....27
Marcinak v. Technical Mechanical
Services, Inc., 17 A.D.3d 140,
793 N.Y.S.2d 350 (1st Dep't 2005).....8, 9, 12
Matter of DES Market Share Litigation,
79 N.Y.2d 299, 591 N.E.2d 226 (1992).....24
Mitchell v. Harmony, 54 U.S. (13 How.) 115
(1852).....27
Pantote Big Alpha Foods, Inc. v.
Schefman, 121 A.D.2d 295,
503 N.Y.S.2d 58 (1st Dep't 1986).....14
Pinkow v. Herfield, 264 A.D.2d 356
695 N.Y.S.2d 20 (1st Dep't 1999).....8
Pivar v. Graduate School of Figurative
Art of the New York Academy
of Art, 290 A.D.2d 212, 735
N.Y.S.2d 522 (1st Dep't 2002).....16
Ritt v. Lenox Hill Hosp., 182 A.D.2d
560, 582 N.Y.S.2d 712
(1st Dep't 1992).....8, 10, 15, 30
Rivera v. W. & R. Service Station, Inc.,
34 A.D.2d 115, 309 N.Y.S.2d
274 (1st Dep't 1970).....16
Rochin v. California, 342 U.S. 165
(1952).....29
Rodriguez v. Cato, 63 A.D.2d 922
406 N.Y.S.2d 100 (1st Dep't 1978).....16
Roma v. Blaustein, 44 AD2d 576, 353
NYS2d 44 (2d Dep't 1974).....9
Ross v. Bernhard, 396 U.S. 531
(1970).....26, 27
Schenck v. Prudential Ins. Co. of America,
167 Misc. 282, 3 N.Y.S.2d

856 (Sup. Ct. 1938).....23
Scott v. Neely, 140 U.S. 106 (1891).....26
Shanty Hollow Corp. v. Poladian, 23 A.D.2d 132, 259 N.Y.S.2d 541 (3d Dep't 1965).....12
Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 165 N.Y.S.2d 498, 144 N.E.2d 387 (1957).....19
Small v. Lorillard Tobacco Co., Inc., 94 N.Y.2d 43, 698 N.Y.S.2d 615, 720 N.E.2d 892 (1999).....18
Smith v. Phillips, 455 U.S. 209 (1982).....31
Sumner v. Extebank, 58 N.Y.2d 1087, 462 N.Y.S.2d 810, 449 N.E.2d 704, 35 U.C.C. Rep. Serv. 1362 (1983).....19
Telaro v. Telaro, 25 N.Y.2d 433, 306 N.Y.S.2d 920, 255 N.E.2d 158 (1969).....16
Tortorello v. Carlin, 260 A.D.2d 201, 688 N.Y.S.2d 64 (1st Dep't 1999).....14
Transportation Line v. Hope, 95 U.S. 297 (1877).....27
Twining v. New Jersey, 211 U.S. 78 (1908).....22, 23
U.S. v. Olano, 507 U.S. 725 (1993).....29, 31
U.S. v. Philadelphia & Reading R.R., 123 U.S. 113 (1887).....27, 31
Vicksburg & Meridian R.R. v. Putnam, 118 U.S. 545 (1886).....27

Constitutional Provisions:
U.S.CONST. pmbl.....2, 25
U.S.CONST. amend. VII.....2, 24

U.S.CONST. amend IX.....2, 25
U.S.CONST. amend. X.....2, 25
U.S.CONST. amend. XIV § 1.....2, 21, 25
N.Y.CONST. art. I § 2.....30

Statutes:

CPLR 2214(b).....10, 11
CPLR 2214(c).....11
CPLR 3212(b).....11
CPLR 4017.....9
FED.R.CIV.P. 56, NOTES OF ADVISORY COMMITTEE ON RULES (Amended Mar. 19, 1948; July 1, 1963; Aug. 1, 1987).....27
SUP.CT.R. 14.1 (g)(i).....5, 6, 7, 8, 10, 12, 15, 16, 18, 19, 21

Miscellaneous:

6 A.L.R. 4th 945.....14
ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (3d ed., Aspen Publishers 2006). 27
John P. Kaminisi, *Restoring the Grand Security: The Debate Over a Federal Bill of Rights*, 1787-1792, 33 SANTA CLARA L. REV. 887, 897-899 (1993).....25
Siegel, N.Y.S. LAW DIGEST, No. 333 (Sept. 1987).....6
N.Y.S. LAW DIGEST, No. 520 (April 2003).....19
http://www.nycourts.gov/supctmanh/conferences.htm.....6

OPINIONS BELLOW

The order of the Supreme Court of the State of New York, New York County (Appendix ("App.") 4-31) is unreported. The opinion of the Supreme Court of the State of New York, Appellate Division, First Department (App. 2-3) is reported at 50 A.D.3d 314, 855 N.Y.S.2d 83, 2008 N.Y. Slip Op. 03060 (1st Dep't 2008). The decision of the Supreme Court of the State of New York, Appellate Division, First Department (App. 32), denying reargument and leave to appeal to the Court of Appeals of the State of New York is reported at 2008 N.Y. Slip Op. 77720(U) (App. Div. 1st Dept. 2008). The opinion of the State of New York Court of Appeals (App. 1) is reported at 11 N.Y.3d 827, 897 N.E.2d 1079, 868 N.Y.S.2d 595, 2008 N.Y. Slip Op. 87455 (2008). The decision of the State of New York Court of Appeals, denying reargument (App. 33) is reported at 2009 N.Y. Slip Op. 61492 (2009).

BASIS FOR JURISDICTION

The order of the Supreme Court of the State of New York, New York County granting summary judgment was entered on February 5, 2007 (App. 4-31). The Supreme Court of the State of New York, Appellate Division, First Department unanimously affirmed the aforementioned order and judgment of the Supreme Court on April 3, 2008 (App. 2-3). The Supreme Court of the State, Appellate Division, First Department denied Petitioner's motion for reargument and for leave to appeal to the Court of Appeals on June 15, 2008 (App. 32). On October 28, 2008, the State of New York Court of Appeals entered an order dismissing Petitioner's appeal and denying Petitioner's motion for leave to appeal (App.

1). The New York State Court of Appeals denied Petitioner's motion for reargument on January 22, 2009 (App. 33).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

APPLICABLE PROVISIONS OF LAW

U.S.CONST. pmbl.; U.S.CONST. amend. VII; U.S.CONST. amend. IX; U.S.CONST. amend. X; U.S.CONST. amend. XIV § 1; and 28 U.S.C. § 1257(a) are reprinted at App. 34-35.

STATEMENT OF THE CASE

(A) Statement of the facts.

In 1997, Sonido, Inc. ("Sonido") and Mark Hynes ("Hynes") executed a contract – an assignment of rights[1] – granting Mark Hynes a ten percent (10%) interest in all Internet sales of Sonido's catalogue.[2] The contract was printed in bold type, consisted of one sentence, and read in its entirety, "IT IS HEREBY STIPULATED AND AGREED BY AND BETWEEN SONIDO, INC. AND MARK T. HYNES, THAT SONIDO, INC., WILL PAY MARK T. HYNES, TEN PERCENT '10 (%)' OF ALL SALES MADE AND PAID FOR VIA THE INTERNET, OF MUSIC, VIDEOS, ART, WORDS AND ADVERTISEMENT."[3] The contract was written by Jerry Masucci ("Masucci"), the company's owner,[4] who had been referred to Hynes (a Navy trained specialist in

---

[1] App. 114.

[2] Record ("R.") 261-262, 286 & 307.

[3] App. 43.

[4] R. 240.

computers, system administration, and data base administration, who had also created, and handled chief management of, systems for a Florida police department, Corporate Micros, Lehman Brothers, and FIBA Nordic Securities) by Microsoft Corporation.[5]

It is undisputed on the record that when the contract was executed, the sale of music over the Internet was in an embryonic stage of development with relatively little commercial value, and that it was uncertain if, and how, Internet sales could bring a profit.[6] Hynes alleges that it was because of such financial risks that Sonido gave him the executed assignment – particularly, for the development of an Internet project with the multiple sophisticated aims needed to make Internet commerce of music viable at a time when it was not – not merely the development of a company website.[7] Aside from the purpose of creating an entire Internet network and database for Sonido,[8] another key purpose behind the contractual assignment was the development of a program for a company-wide, comprehensive secure billing system that would interface with the aforementioned Internet network, and with all of the company's music (which was to be encrypted and encoded),[9] as Masucci believed that the company was losing money through fraudulent bookkeeping, lost royalties, and other related problems.[10] Masucci wanted a program that was "fully redundant;" a program that would track everything that went on in his company, and in which entries could not be deleted, as Masucci also

---

[5] R. 196-197.
[6] R. 286.
[7] R. 74, 200-206, 231 & 286.
[8] R. 37 (App. 38-42).
[9] R. 224.
[10] R. 200-204.

believed that he was losing money to inter-company theft.[11] The program was also meant to calculate royalties for all of Sonido's artists, authors, publishers, and producers.[12] It was also to function in producing invoices, and tracking *all* of the manufacturing and sale contracts of Sonido.[13] In short, the program was to bring the management of everything in Sonido to Masucci's fingertips.[14]

Hynes invested his own funds in servers and software, worked for hundreds of hours developing the Internet project, and encoded the music from thousands of compact discs from every label of the company's catalog.[15] Hynes was never paid for his services other than with the contract that is the subject of the present litigation.[16]

In November of 1997, the Argentinean magazine, Presario TV and Cable, published an article quoting Masucci as stating that all his company's material would be distributed via the Internet.[17] Shortly thereafter, on December 21, 1997, Masucci died unexpectedly while in Argentina.[18] Hynes has alleged that Masucci was murdered.[19]

After Masucci's death, Sonido attempted to terminate its contract with Hynes through the use of an instrument (a release), which Hynes alleged to be a forgery.[20] Sonido also repeatedly thwarted Hynes'

---

[11] R. 203-204.
[12] R. 202.
[13] R. 202.
[14] R. 202.
[15] R. 36 (App. 38-42), 165-166, 182, 194-95, 211-212, 224, 239 & 260.
[16] R. 93, 165-166 & 260.
[17] R. 36 (App. 38-42).
[18] R. 308.
[19] App. 172-173.
[20] R. 9, 207-208 & 227-231.

efforts to honor the contract and to have it honored – attempting to repudiate the contract.[21] Sonido refers to these events collectively as a "discontinuance of [Hynes'] services."[22] In line with the above, Sonido has subsequently claimed never to have pursued the development of any Internet business, and never to have sold any music over the Internet – even stating that it has refused to contemplate doing so.[23] Hynes has asserted, however, that Sonido has indeed been receiving payment from Internet sales of licensed material; sales that correspond to expectation damages in an amount of roughly four million dollars ($4,000,000) per year.[24]

(B) Proceedings in the Supreme Court of the State of New York, New York County.

Hynes brought the present action in September of 2000, alleging breach of contract.[25] In February of 2001, Sonido moved to dismiss Hynes' Complaint based on the aforementioned alleged release that Hynes claimed to be a forgery.[26] It should be noted, as is required by SUP.CT.R. 14(1)(g)(i), that it was in his opposition papers to said motion that Petitioner first raised the issue of his right to a trial by jury, as Petitioner requested that the matter be submitted to a jury for trial, specifically stating that he had a property right that should not be taken without trial[27] In his opposition papers, Petitioner also requested that the Court "set up a discovery

---

[21] R. 9, 91-93, 207-208, 227-231 & 286.
[22] R. 308.
[23] R. 309.
[24] R. 60-63, 71-72 & 286-293. Compare R. 248.
[25] Resp't Br. Opp'n Mot. Leave Appeal Ct. Appeals at 2.
[26] R. 9.
[27] R. 93.

schedule."[28] The Motion Court, however, did not grant Petitioner's requests, failing to set a date for trial or to schedule discovery.[29] (It should be noted, as required by SUP.CT.R. 14.1(g)(i), that in New York practice, if an issue is brought before a court on motion, and not specifically ruled on, the relief is deemed denied, and thus reviewable on appeal.)[30]

Instead of ruling on Petitioner's request for a jury trial and for scheduled discovery,[31] the Supreme Court of the State of New York, New York County directed the parties to obtain a date on a Referee's calendar so that the Referee could determine the genuineness of the release.[32] The Referee determined that the document was not an original, as sworn by Sonido's witnesses, but that it was instead a photocopy and inadmissible.[33]

In December of 2006, Sonido made a motion for summary judgment, asserting as its ground for the motion that Hynes had suffered no damages, and that he subsequently lacked an essential element

---

[28] R. 95-96.

[29] R. 9-10. An appeal from a final order that disposes of the entire case (and is thus the equivalent of a final judgment) may be held to bring up for review prior non-final orders. See *Hurd v. Lis*, 126 A.D.2d 163,166, 513 N.Y.S.2d 278, 280 (3d Dep't 1987), discussed in Siegel, N.Y.S. LAW DIGEST, No. 333, p. 3 (Sept. 1987), which so held.

[30] *Brown v. U.S. Vanadium Corp.*, 198 A.D.2d 863, 864, 604 N.Y.S.2d 432, 433 (4th Dep't 1993); *Barrett v. Huff*, 6 A.D.3d 1164, 1168, 776 N.Y.S.2d 678, 682 (4th Dep't 2004). "Compliance and pretrial conferences are fixed by the Justice either (i) in a discovery scheduling order issued at a preliminary conference or compliance conference or (ii) in a decision on a motion." http://www.nycourts.gov/supctmanh/conferences.htm.

[31] R. 95.

[32] R. 9.

[33] R. 282-285.

required for his cause of action.[34] (Sonido asserted that Hynes had not incurred any damages because Sonido had never allegedly made, or attempted to make, any sales over the Internet.)[35] Hynes, however, submitted opposition to the Motion, including documentary and affidavit evidence that Sonido's music was indeed being sold over the Internet.[36] In accordance with the requirements of SUP.CT.R. 14(1)(g)(i), it should be noted that as Petitioner presented evidence contradicting Respondent's assertions that no triable issue of fact existed,[37] Petitioner also, by argument on the motion, raised the issue that a triable issue of fact did indeed exist, and, by extension, the issue of his right to trial (as mentioned above, in New York practice, issues are preserved on a motion if implied in the arguments presented on the motion papers).[38]

In its reply to Hynes' opposition, Sonido introduced for the first time ever the defense that the contract in question only applied to sales made directly over a particular website – a website that it coincidentally never developed, as it had unilaterally attempted to terminate its agreement with Hynes.[39] (Of particular note, Sonido had not made this defense previously in the original motion papers, and had

---

[34] R. 10; Resp't Br. Opp'n Mot. Leave Appeal Ct. Appeals at 2.

[35] R. 300, 307, 309 & 325-326; Resp't Br. Opp'n Mot. Leave Appeal Ct. Appeals at 2.

[36] R. 286-292; Br. Plaintiff-Appellant at 34; App. 12.

[37] R. 286-293. It should also be noted that in New York practice the Complaint, if verified, is constantly before the court, and is deemed evidence in support of a plaintiff's case on a motion for summary judgment. *Falk v. Goodman*, 7 N.Y.2d 87, 91, 195 N.Y.S.2d 645, 647, 163 N.E.2d 871, 873 (1959). See also R. 213.

[38] *Brown v. U.S. Vanadium Corp.*, 198 A.D.2d 863, 864, 604 N.Y.S.2d 432, 433 (4th Dep't 1993); *Barrett v. Huff*, 6 A.D.3d 1164, 1168, 776 N.Y.S.2d 678, 682 (4th Dep't 2004).

[39] Compare R. 305-328 and R. 294-299. See also 302-304.

even failed to interpose the defense in its belated Answer – which was filed roughly seven years after the Complaint[40] along with the motion for summary judgment.)[41] As a party opposing a motion in New York practice is not permitted a sur-reply, Hynes was limited to the above submission of papers.[42] Nonetheless, and as mentioned above, in Hynes' opposition papers evidence was present – and specifically argued – that contradicted Sonido's contention as to the meaning of the contract (said evidence was submitted in documentary form, as well as affidavit evidence).[43] As required by SUP.CT.R. 14.1(g)(i), it should be noted, in regard to the above, that in New York practice[44] there is no requirement to continue making an argument for it to be preserved, once made, or to present further

---

[40] *Falk v. Goodman*, 7 N.Y.2d 87, 91, 195 N.Y.S.2d 645, 647, 163 N.E.2d 871, 873 (1959) (holding that summary judgment may not be granted whenever the *pleadings* raise clear, well-defined and genuine issues; nor may it be granted whenever there is doubt as to the existence of a triable issue, or even when the issue is arguable.); *Dannasch v. Bifulco*, 184 A.D.2d 415, 416-417, 585 N.Y.S.2d 360, 361-362 (1st Dep't 1992) (holding that treating motion to dismiss as motion for summary judgment was improper, and that allegations of *complaint* adequately stated cause of action for piercing corporate veil).

[41] Compare R. 305-328 and R. 294-299. See also R. 288; Petitioner's Comments Concerning Subject Matter Jurisdiction at 16.

[42] The practice of filing a sur-reply was repudiated in *Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 562, 582 N.Y.S.2d 712, 713-714 (1st Dep't 1992); see also *Lumbermens Mut. Cas. Co. v. Morse Shoe Co.*, 218 A.D.2d 624, 626, 630 N.Y.S.2d 1003, 1004-1005 (1st Dep't 1995), which has been applied to bar consideration of such submissions. See e.g. *Pinkow v. Herfield*, 264 A.D.2d 356, 358, 695 N.Y.S.2d 20, 22 (1st Dep't 1999).

[43] R. 286-293; Plaintiff-Appellant's Br. at 7-34; Resp't Br. Opp'n Mot. Leave Appeal Ct. Appeals at 3.

[44] *Marcinak v. Technical Mechanical Services, Inc.*, 17 A.D.3d 140, 140-141, 793 N.Y.S.2d 350, 351 (1st Dep't 2005).

objections once the argument has been presented to the court on motion.[45] As mentioned earlier, the Motion Court's failure to specifically rule on a portion of a motion is deemed a denial of the part of the motion raising the issue by implication in its argument, and thus is reviewable on appeal of the order or judgment on the motion.[46]

The Petitioner had thus raised the issue that a triable issue of fact existed in his motion papers – by virtue of his argument and evidence presented – and was not required to tender any other method of preserving said issue[47] (a practice that differs from the procedure employed when there is an actual trial – as opposed to the practice on a motion – where an issue not preserved by overt objected to can be deemed waived).[48]

---

[45] CPLR 4017. See also *Roma v. Blaustein*, 44 AD2d 576, 577-578, 353 NYS2d 44, 46-48 (2d Dep't 1974) (holding that while formal exceptions to rulings are no longer required, the trial court's conduct in refusing to permit the taking of an exception was *excessively antagonistic*, and that though a party must usually – during trial proceedings, as opposed to hearings on motion – make known the action which the party requests the court to take or, *if the party has not already indicated it*, his objection to the action of the court) (emphasis added). It should also be noted that, though this ruling is applied in a trial setting, its rule would also apply in the more forgiving motion setting – particularly on a motion for summary judgment.

[46] *Brown v. U.S. Vanadium Corp.*, 198 A.D.2d 863, 864, 604 N.Y.S.2d 432, 433 (4th Dep't 1993); *Barrett v. Huff*, 6 A.D.3d 1164, 1168, 776 N.Y.S.2d 678, 682 (4th Dep't 2004).

[47] *Marcinak v. Technical Mechanical Services, Inc.*, 17 A.D.3d 140, 140-141, 793 N.Y.S.2d 350, 351 (1st Dep't 2005).

[48] *Glow-Brite Elec. Service Corp. v. Frocol Restaurant Corp.*, 56 A.D.2d 909, 392 N.Y.S.2d 695, 696 (2d Dep't 1977).

After receiving the papers on the motion,[49] the Motion Court scheduled a hearing on the motion, which itself was improper;[50] yet, it was not until the hearing itself that the Motion Court informed the Parties that the scope of the hearing would be strictly limited to a factual determination regarding the one issue that was brought up for the first time in Sonido's reply papers (*i.e.* whether Hynes had any evidence of sales being made directly by Sonido over a particular website). [51]

It should also be noted here, as required by SUP.CT.R. 14.1(g)(i)), that, by determining an issue raised for the first time in the moving party's reply papers, the Motion Court did not follow the prescribed procedure for notice as to the issues to be decided on the motion; procedures which are established to protect a party's rights of notice, and to ensure a meaningful opportunity to respond.[52]

---

[49] R. 10.

[50] *Esteve v. Abad*, 271 A.D. 725, 727, 68 N.Y.S.2d 322, 324 (1st Dep't 1947) (holding that here plaintiff's affidavits submitted in opposition to defendant's motion for summary judgment disclosed existence of issues of fact, court should then have denied the motion, and court's action in ordering a reference to aid court in determining the issues involved was improper, violating the party's Constitutional and fundamental rights).

[51] R. 10.

[52] See also *Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 561-562, 582 N.Y.S.2d 712, 713 (1st Dep't 1992), where the Appellate Division, First Department states: "By making, for the first time in its reply, the contention that the medical record does not contain any indication of fetal distress, defendant has obviated the need for a response by plaintiff (CPLR 2214(b)); only when a defendant refutes 'by specific factual reference the allegations of malpractice made by plaintiff' (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 326, 508 N.Y.S.2d 923, 501 N.E.2d 572) does the burden of going forward with the proof shift to the plaintiff "to produce evidentiary proof in admissible form establishing the existence of material questions of fact" (68

The preservation of this issue on the face of the record, presumptively cataloging unfair surprise, is apparent on the face of the record created before the Motion Court, as the Motion Court readily stated that it had determined this material issue in favor of Respondent at the outset of the hearing.[53]

Furthermore, the Motion Court explicitly stated that the limited purpose of the hearing was to determine an issue of fact,[54] which itself became material only because the Motion Court had already determined another material issue of fact (concerning the meaning of the contract) prior to the hearing; stating that it had already reached a conclusion as to the meaning of the contract,[55] and had done so regardless of the conflicting factual assertions presented by both parties.[56] As stated previously, the Motion Court's conclusion was based on a contention raised for the first time in the Respondent's reply papers,[57] as nowhere on the record prior to its reply had Respondent made a distinction between Internet sales in general and those made over a particular website – despite Petitioner having presented the assertion to the Court, roughly seven years prior, that the subject matter of the contract concerned income resulting

---

N.Y.2d at 326-327, 508 N.Y.S.2d 923, 501 N.E.2d 572, *supra*)." See also CPLR 3212(b), CPLR 2214(c); *Falk v. Goodman*, 7 N.Y.2d 87, 91, 195 N.Y.S.2d 645, 647, 163 N.E.2d 871, 873 (1959); *Dannasch v. Bifulco*, 184 A.D.2d 415, 416-417, 585 N.Y.S.2d 360, 361-362 (1st Dep't 1992); *Shanty Hollow Corp. v. Poladian*, 23 A.D.2d 132, 259 N.Y.S.2d 541 (3d Dep't 1965), aff'd 17 N.Y.2d 536, 267 N.Y.S.2d 912, 215 N.E.2d 158 (1966).

[53] R. 11, 18, 22 & 30.

[54] R. 10-11.

[55] R. 11.

[56] R. 10 & 286-294.

[57] R. 10-11, 30 & 296; Petitioner's Comments Concerning Subject Matter Jurisdiction at 15-16.

from *any* source by the Internet method (specifically referring to sales through licenses).[58]

In this way, the Motion Court reached its decision despite the fact that the factual issue of ambiguity concerning the meaning of the contract was raised before the hearing in Hynes' opposition papers (preserving the issue for appeal),[59] as well as in Sonido's reply papers (something that is readily apparent by merely comparing the parties' conflicting *factual* claims as to the meaning of the contract).[60] As required by SUP.CT.R. 14.1(g)(i), it should be noted that by ruling against the arguments and evidence presented by Petitioner on the motion,[61] the Motion Court preserved Petitioner's exceptions to the ruling,[62] and, as there is not any requirement to continue pressing an issue already placed before the court on motion,[63] the issue is deemed preserved for appeal.[64]

---

[58] R. 37.

[59] *Brown v. U.S. Vanadium Corp.*, 198 A.D.2d 863, 864, 604 N.Y.S.2d 432, 433 (4th Dep't 1993); *Barrett v. Huff*, 6 A.D.3d 1164, 1168, 776 N.Y.S.2d 678, 682 (4th Dep't 2004).

[60] R. 286-299.

[61] In New York practice the pleadings are required to be considered by a court on summary judgment. *Falk v. Goodman*, 7 N.Y.2d 87, 91, 195 N.Y.S.2d 645, 647, 163 N.E.2d 871, 873 (1959). R. 36-37.

[62] *Brown v. U.S. Vanadium Corp.*, 198 A.D.2d 863, 864, 604 N.Y.S.2d 432, 433 (4th Dep't 1993); *Barrett v. Huff*, 6 A.D.3d 1164, 1168, 776 N.Y.S.2d 678, 682 (4th Dep't 2004).

[63] *Id.* See also *Marcinak v. Technical Mechanical Services, Inc.*, 17 A.D.3d 140, 140-141, 793 N.Y.S.2d 350, 351 (1st Dep't 2005) (although party did not specifically oppose building owner's motion to set aside verdict, it did assert its opposition by virtue of argument that its contract did not displace owner's duty to keep premises reasonably safe, and therefore issue was sufficiently preserved for appellate review).

[64] *Brown v. U.S. Vanadium Corp.*, 198 A.D.2d 863, 604 N.Y.S.2d 432 (4th Dep't 1993); *Barrett v. Huff*, 6 A.D.3d 1164, 776 N.Y.S.2d 678 (4th Dep't 2004).

It should also be noted that throughout the hearing, the narrow scope set by the Motion Court was strictly enforced, and Hynes was repeatedly not allowed to pursue any inquiry, in his questioning of the testifying witnesses, that touched upon the material issue of whether the contract in question applied to all Internet sales, or whether it was limited only to those sales made directly over a particular website by Sonido.[65] Exception was taken – by argument – to the narrow scope set by the Motion Court, along with its interpretation of the contract that led to such a restricted scope,[66] and in such way, the issues were preserved for appeal – although such exceptions were unnecessary for preservation purposes, as the hearing was on motion. (The practice of preservation as it relates to motion practice differs to that of trial practice; for the issues raised on motion practice are deemed preserved if implicit in the arguments raised in the motion papers.)[67] It should also be noted that the Motion Court actively prevented – and interfered with – testimony that would favor Hynes;[68] particularly because it had already made a factual determination as to the meaning of the contract, and used that determination to support its ruling that all evidence contradicting its determination was beyond the narrow scope that it had set for the hearing.[69]

---

[65] R. 11, 14-18, 24 & 30. See also R. 295-296. It should also be noted that the Motion Court stated that there was no question that Sonido music is sold over the Internet (a fact readily admitted during the hearing).

[66] R. 11-12, 15-19, 23-24, 30-31.

[67] *Brown v. U.S. Vanadium Corp.*, 198 A.D.2d 863, 864, 604 N.Y.S.2d 432, 433 (4th Dep't 1993); *Barrett v. Huff*, 6 A.D.3d 1164, 1168, 776 N.Y.S.2d 678, 682 (4th Dep't 2004).

[68] R. 15 & 22.

[69] Id.

Furthermore, aside from refusing Petitioner the right to question witnesses regarding the material issue of the contract's meaning, the Motion Court construed any inference, raised by Petitioner, that could lean in his favor in the favor of Respondent,[70] to stymie the questioning – something that not only violates the established procedure for summary judgment,[71] but that also shows clear impartiality on the part of the Motion Court, chronicling another violation of basic due process.[72]

One example of the abovementioned bias that is particularly valuable in noting – as it both illustrates the tendency of the Motion Court to draw inferences against Petitioner, and to do so against Petitioner in a way that would pollute the record at Petitioner's expense – appears in the record at the conclusion of the hearing.[73] After Petitioner took issue with the Motion Court's interpretation of the contract,[74] and after the Court cut short Petitioner's argument as to the nature of a portion of his claim by substituting a cryptic and complicated statement of what it took to be Petitioner's claim[75] (one that could be taken to contain some of the assertions from Petitioner's Complaint, as it referred to sales of music made by a Sonido customer – something previously discussed at

---

[70] R. 16, 18, 19, 23-24, 30 & 31. Particular attention should be given to R. 22 (App. 20), where the Motion Court interrupted questioning to itself state Respondent's position as if it were fact.

[71] *Tortorello v. Carlin*, 260 A.D.2d 201, 206, 688 N.Y.S.2d 64, 68 (1st Dep't 1999); *Pantote Big Alpha Foods, Inc. v. Schefman*, 121 A.D.2d 295, 296, 503 N.Y.S.2d 58, 59 (1st Dep't 1986); *Gerard v. Inglese*, 11 A.D.2d 381, 382, 206 N.Y.S.2d 879, 881 (2d Dep't 1960).

[72] 6 A.L.R. 4th 945.

[73] R. 31-32.

[74] R. 31.

[75] R. 32.

some length in the hearing[76] – but which obviously would not be understood by Petitioner as contradicting everything that he had stated previously and with great clarity in his Complaint,[77] or in the hearing), the Motion Court asked Petitioner's counsel if such described Petitioner's claim. When answered in the affirmative, as even that statement could conceivably fit within Petitioner's contractual right, the Court stated that it completely disagreed with Petitioner's position, and proceeded to grant Respondent's motion. This final example of bias, attempting to view Petitioner's argument in a light so unfavorable as to not even make sense against the backdrop of Petitioner's Complaint (which the Court was required by the law of the land in New York to hold as the definitive position of Petitioner's case on the motion),[78] clearly preserves the issue of impartiality on the record – an impartiality that itself stems from a factual determination that the Court made in violation of Petitioner's right to due process of law,[79] and a position which it was unwilling to waiver from even when exception was made.

Based chiefly on the Motion Court's factual determination of the aforementioned issues, it granted Sonido's motion for summary judgment, dismissing every cause of action alleged in Hynes' Complaint.[80]

A final related point should be made, as it relates to SUP.CT.R. 14.1(g)(i), and particularly to the

---

[76] R. 17-19 & 28-30.

[77] R. 35-39.

[78] *Falk v. Goodman*, 7 N.Y.2d 87, 91, 195 N.Y.S.2d 645, 647, 163 N.E.2d 871, 873 (1959).

[79] *Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 561-562, 582 N.Y.S.2d 712, 713 (1st Dep't 1992).

[80] R. 7 & 305.

manner that the abovementioned issues were raised before the Supreme Court of the State of New York, New York County. Because of the Motion Court's aforementioned actions in: (1) ruling against the arguments and evidence brought up in Petitioner's opposition papers; (2) it's surprising limitation of the scope of the hearing after determining an issue of fact that was raised for the first time in the reply papers of the moving party – preventing retort; and (3) its thwarting of Petitioner's attempts to pursue a line of questioning supporting his claims, it is clear that the Motion Court's own action created prejudice and prevented such issues from being raised – constituting a circumstance in which the legal issues raised could not have been obviated or cured below, and were consequently reviewable upon appeal[81] – particularly in light of the fact that such issues are clearly apparent on the face of the record.[82]

---

[81] *Rodriguez v. Cato*, 63 A.D.2d 922, 923, 406 N.Y.S.2d 100, 102 (1st Dep't 1978); *Graham by Graham v. Murphy*, 135 A.D.2d 326, 329, 525 N.Y.S.2d 414, 417 (3d Dep't 1988); *Breitung v. Canzano*, 238 A.D.2d 901, 901-902, 660 N.Y.S.2d 765, 766 (4th Dep't 1997) ("Because the error in the [unobjected to] jury charge was so fundamental that it precluded proper resolution of the central issue in the case, we reverse the judgment and grant a new trial." (citation omitted)); *Pivar v. Graduate School of Figurative Art of the New York Academy of Art*, 290 A.D.2d 212, 213, 735 N.Y.S.2d 522, 524 (1st Dep't 2002); *Telaro v. Telaro*, 25 N.Y.2d 433, 438-439, 306 N.Y.S.2d 920, 924, 255 N.E.2d 158, 160 (1969). See also *Rivera v. W. & R. Service Station, Inc.*, 34 A.D.2d 115, 117, 309 N.Y.S.2d 274, 276 (1st Dep't 1970) (new trial ordered in interest of justice where fundamental error involved).

[82] SUP.CT.R. 14.1(g)(i) ("[T]he places in the record where the matter appears (e.g., court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised...").

(C) The Opinion of the Supreme Court of the State of New York, Appellate Division, First Department.

Hynes took an appeal from the Supreme Court of the State of New York, New York County to the Supreme Court of the State of New York, Appellate Division, First Department ("Appellate Division") on March 21, 2007. In his brief he alleged that: (1) his Constitutionally guaranteed right to due process of law had been violated when summary judgment was granted on issues raised for the first time in the Sonido's reply papers;[83] (2) that his Constitutionally guaranteed right to a trial by jury, as well as the guaranteed due process rights associated with said right, had been violated by the fact that the Motion Court determined triable issues of fact without letting those issues go before a jury;[84] and, (3) that the Motion Court had not followed proper procedure, and had thus violated his right to due process of law.[85]

The Appellate Division, however, affirmed the order and judgment of the Supreme Court of Motion Court on April 3, 2008.[86] In its decision, the Appellate Division specifically stated that it had considered all of the issues raised by Hynes on the appeal, which included the Constitutional issues referenced above, and found them "unavailing."[87] Of

---

[83] R.37, R. 296; Br. Plaintiff-Appellant at 14 & 22-23; Reply Br. Plaintiff-Appellant at 1-7 (particularly note 15 at 4).

[84] R.10, R.15, R.22, and R.93; Br. Plaintiff-Appellant at i, 1, 7-11, 16 & 22-28; The Constitutional nature of the question was specifically noted in the Br. Plaintiff-Appellant at 10.

[85] Reply Br. Plaintiff-Appellant at 7, 14 & 19. See also Br. Plaintiff-Appellant at 11-14 & 22.

[86] Pet. Mot. Leave Appeal Ct. Appeals at 3.

[87] App. 2-3.

note, and as required by SUP.CT.R. 14.1(g)(i), the decision and opinion of the Appellate Division makes specific reference to the factual dispute regarding the meaning of the material term in question,[88] and also addresses the factual issue of ambiguity directly on the face of the opinion[89] – thereby affirming in its opinion the practice of a motion court acting as a fact finder on a motion for summary judgment.[90] Not only did the Appellate Division's decision specifically affirm the Supreme Court's determination of "the circumstances" of the case (despite the fact that the opinion clearly mentions that the appeal was from a motion for summary judgment – which makes it clear on the face of the opinion that no determination of the facts had yet been made by a jury),[91] it also used its unique power to review the facts of the case (where by law it places itself in the place of the trial court),[92] to make factual determinations that it too is

---

[88] *Id.*

[89] *Id.*

[90] Pet. Mot. Leave Appeal Ct. Appeals at 11-12 & 16.

[91] Pet. Mot. Leave Appeal Ct. Appeals at16; App. 2-3.

[92] *Small v. Lorillard Tobacco Co., Inc.*, 94 N.Y.2d 43, 53, 698 N.Y.S.2d 615, 619, 720 N.E.2d 892, 896 (1999) (citation omitted). With respect to the Appellate Division's authority to review mixed questions of law and fact, see, e.g., *Irmiyayeva v. Thompson*, 296 A.D.2d 439, 440, 745 N.Y.S.2d 199, 200 (2d Dep't 2002) (on appeal from an order granting or denying a motion for summary judgment, the Appellate Division has the inherent authority to search the record and grant summary judgment where appropriate); *Hazelhurst v. Brita Products Co.*, 295 A.D.2d 240, 241 744 N.Y.S.2d 31, 32 (1st Dep't 2002) (holding that the Appellate Division is vested with the same discretionary authority as the motion court to determine the propriety of class certification, even where the motion court has not abused its discretion as a matter of law). So too, the Appellate Division has the authority to review unpreserved issues in the interest of justice. *Bingham v. New York City Transit Authority*, 99 N.Y.2d 355, 359, 756 N.Y.S.2d 129, 131,

not allowed to make on a summary judgment motion,[93] which is seen from the fact that it stated in its opinion that it rejected Petitioner's interpretation of the contract "upon an examination of the intent of the parties within the four corners of the agreement, *as well as the circumstances under which it was executed*" (emphasis added). The fact that the Appellate Division used its power to review is evident in that it also stated in its opinion that it had considered "the *allegation in the complaint* of breach by failure to pay the percentage of income from internet sales, *the circumstances* under which the agreement was executed and *the relationship of the parties...*" (emphasis added). In accordance with SUP.CT.R. 14.1(g)(i), it should be noted that the issue of the Appellate Division not being able to settle questions of material fact in its review of summary judgment was brought up by Petitioner in his brief to the Appellate Division, where Petitioner in his argument that no issue of material fact could be settled by a court on summary judgment, cited authority from the Appellate Division recognizing that it did not have such power.[94] In accordance with SUP.CT.R. 14.1(g)(i), it should be noted that as the above-stated questions of Petitioner's right to due process and trial by jury were brought up for appeal

---

786 N.E.2d 28, 30 (2003), discussed in N.Y.S. LAW DIGEST, No. 520, at 3 (April 2003).

[93] *Sumner v. Extebank*, 58 N.Y.2d 1087, 1089, 462 N.Y.S.2d 810, 810-811, 449 N.E.2d 704, 35 U.C.C. Rep. Serv. 1362 (1983) (mem.). See also *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 505, 144 N.E.2d 387, 392 (1957).

[94] Br. Plaintiff-Appellant at 7-8. *Esteve v. Abad*, 271 A.D. 725, 727, 68 N.Y.S.2d 322, 324 (1st Dep't 1947) (holding that a triable issue of fact relates to a Constitutional and fundamental right to trial by jury, which *no court* can take away).

before the Appellate Division, and, as the Appellate Division considered Petitioner's Constitutional questions and found them unavailing as to its decision on the case[95] – failing to cite adequate and independent New York State grounds for its determination,[96] such questions are preserved for appeal before this Honorable Court.[97]

(D) The State of New York Court of Appeals Opinion and Decision.

Petitioner took an Appeal, and simultaneously made a motion for leave to appeal to, the State of New York Court of Appeals ("Court of Appeals") on August 12, 2008.[98] On appeal, Petitioner presented the aforementioned issues regarding his constitutionally guaranteed rights to trial and to due process of law – particularly their being violated in the proceedings before the Supreme Court of the State of New York, New York County, and before the Appellate Division.[99] On August 26, 2008, the Court of Appeals made its own motion on the appeal to "consider its subject matter jurisdiction with respect to whether a substantial constitutional question is directly involved to support the appeal taken as of right (CPLR 5601[b])."[100] The parties were requested to submit comments on the issue of subject matter jurisdiction,[101] and Petitioner submitted comments in which he alleged that: (1) both the

---

[95] App. 2-3.
[96] *Id.*
[97] *Fox Film Corp. v. Muller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935).
[98] App. 127.
[99] *Id.*
[100] App. 169.
[101] *Id.*

Supreme Court of the State of New York, New York County and the Appellate Division violated his Constitutional right to a trial by jury, when said Court's determined issues of fact;[102] (2) that said Courts violated an associated right to due process, as guaranteed by U.S.CONST. amend. XIV, when they violated his right to a trial by jury, as the Courts failed to follow established procedures of New York State law;[103] and (3) that said Courts violated Petitioner's right to due process, as guaranteed by U.S.CONST. amend. XIV, by granting summary judgment on a material issue that was raised for the first time in Respondent's reply papers – precluding reply – and by upholding a grant of summary judgment in which the court in question did not permit Petitioner meaningful opportunity to confront the evidence brought against his case.[104]

On October 28, 2008 the Court of Appeals dismissed Petitioner's appeal on "the ground that no substantial constitutional question [was] directly involved."[105] In that same Order, the Court of Appeals also denied Petitioner's motion for leave to appeal.[106]

Petitioner moved for reargument of the above determination, but the motion was denied by the Court of Appeals on January 22, 2009.[107]

In accordance with SUP.CT.R. 14.1(g)(i), it should be noted that as the above-stated questions of Petitioner's right to due process and trial by jury were brought up for appeal before the Court of Appeals, and, as the Court of Appeals considered

---

[102] App. 150.
[103] *Id.*
[104] *Id.*
[105] App. 1.
[106] *Id.*
[107] App. 33.

Petitioner's allegations, and found that no substantial Constitutional question was directly involved in the appeal[108] – failing to cite adequate and independent New York State grounds for its determination,[109] such questions are preserved for appeal before this Honorable Court.[110]

REASONS FOR ALLOWANCE OF THE WRIT

I. Petitioner's right to a trial by jury, which should be seen as referenced in the Seventh Amendment, and guaranteed by the Ninth, Tenth and Fourteenth Amendments, was violated when the State Courts in question determined issues of fact, traditionally associated with the province of the jury at common law.

In *Twining v. New Jersey*,[111] this Honorable Court considered:

> [Whether it were] possible that some of the *personal rights* safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law...If this is so, it is not because those rights are enumerated in the first eight Amendments, but *because* they are

---

[108] App. 1.
[109] *Id.*
[110] *Fox Film Corp. v. Muller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935).
[111] 211 U.S. 78 (1908).

> of such a nature that they are included in the conception o the due process of law.[112]

In what follows, Petitioner will argue that the safeguard of due process, enumerated in the Fourteenth Amendment, and referenced in the Seventh Amendment, applies to all cases– State or Federal – in which an issue traditionally tried at common law by a jury is litigated.

(A) The relationship between due process of law, the common law understanding of the jury's role in effectuating due process, and the Seventh Amendment.

As both Questions 1 & 2 of this Petition, *supra*,[113] deal with the issue of Petitioner's claim to a constitutionally protected right to trial in a summary judgment setting, addressing the issue of how the right to trial necessarily attaches to a triable issue of fact is itself a necessary step in determining the answers to said questions

Although the relationship between a triable issue of fact and a party's Seventh Amendment right to a trial by jury is something readily assumed in past New York State opinions,[114] the relationship itself is

---

[112] *Id.* at 99 (emphasis added).

[113] Pet. i, *supra*.

[114] *Esteve v. Abad*, 271 A.D. 725, 727, 68 N.Y.S.2d 322, 324 (1st Dep't 1947) (holding that a triable issue of fact relates to a Constitutional and fundamental right to trial by jury, which *no court* can take away); *Closson v. Seaboard Sand & Gravel Corp.*, 238 A.D. 584, 586, 265 N.Y.S. 160, 162 (1st Dep't 1933) (holding that the right to a jury trial is a substantial Constitutional right not within the discretion of a judge); *Schenck v. Prudential Ins. Co. of America*, 167 Misc. 282, 283, 3 N.Y.S.2d 856, 858 (Sup. Ct. 1938). See also *Ives v. South Buffalo*

seen by New York courts as dating back to the common law understanding of the term "due process of law," as it was understood before the ratification of the United States Constitution;[115] for "due process of law" is seen as relating directly the proposition that no person shall be deprived of her rights to life, liberty or property, except by "the law of the land" or "lawful judgment of [her] peers" [116] (a New York State court analysis of the common law distinction between questions of fact and questions of law – referencing the distinct roles of the jury and judge at common law). In fact, the Seventh Amendment itself makes specific reference to the role of a jury (as it was understood at common law, and at the time of its adoption), when it uses the language "no fact tried by jury," and equates the term to the *preservation* of the common law "right of trial by jury."[117] It should also be noted here that the use of the term "any Court of the United States"[118] in the Seventh Amendment does not necessarily mean that right to a trial by jury of all triable issues is to exclusively receive protection in Federal Courts. The right itself, as described above, stems from the understanding of what due process entailed in its common law milieu, and as the Preamble, Ninth Amendment and Tenth Amendment make clear, there are rights vested in the people, which need not be enumerated to be

---

Ry. Co., 201 N.Y. 271, 291, 94 N.E. 431, 438, 34 L.R.A.N.S. 162, Am. Ann. Cas. 1912B, 156 (1911).

[115] *Gow v. Bingham*, 57 Misc. 66, 107 N.Y.S. 1011, 1014 (Sup. Ct.,1907); *Matter of DES Market Share Litigation*, 79 N.Y.2d 299, 305, 591 N.E.2d 226, 229 (1992); *Fedoryszyn v. Weiss*, 62 Misc.2d 889, 891, 310 N.Y.S.2d 55, 58 (Sup. Ct. 1970).

[116] *Gow v. Bingham*, 57 Misc. 66, 107 N.Y.S. 1011, 1014 (Sup. Ct. 1907).

[117] U.S.CONST. amend. VII.

[118] *Id.*

recognized as protected.[119] The fact that the Seventh Amendment specifically protects the people from infringement of a naturally existing right to trial by jury in the Federal courts, by enumerating said right, does not entail that the people's right to traditional common law protections may be violated freely in State courts without also violating Federally protected rights to due process of law. In fact, an argument can easily be made from the circumstances in which the Constitution was adopted – where many states approved the Constitution only on the guarantee that the new government would immediately create a bill of rights[120] – that it was a mistrust on the part of the people as to whether a Federal government would obviate understood practices and principles of due process (which the people were not willing to succeed),[121] and that such mistrust is the reason the Seventh Amendment gives particular attention to Federal courts. It seems doubtful that the ratifying legislatures were intent on creating a new distinctly Federal right, which, by accident, made specific reference to long-held common law protections. It is also doubtful, given the cultural milieu of the ratifying legislatures referenced previously, that they saw such common law rights as a right to trial by jury of factual questions, as something that any state government could take from its people.

At common law, the distinction between the roles of the judge and jury were more pronounced than

---

[119] U.S.CONST. pmbl.; U.S.CONST. amend IX; U.S.CONST. amend. X.

[120] See John P. Kaminisi, *Restoring the Grand Security: The Debate Over a Federal Bill of Rights*, 1787-1792, 33 SANTA CLARA L. REV. 887, 897-899 (1993) at 908, 912.

[121] *Hurtado v. People of State of California*, 110 U.S. 516, 528, 532, 536 (1884).

they are today, incorporating a distinction between law and equity.[122] Nonetheless, one common thread, running directly from the common law understanding of due process to the Seventh Amendment, was the understanding that the right to a trial of factual issues was an absolute right that could not be impaired by a court.[123]

Because the practice of summary judgment was not adopted by American courts until long after the ratification of the Seventh and Fourteenth Amendments,[124] and as the right to a trial, as mentioned above, was long seen as having a direct relationship to factual issues (taken in the common law context and milieu in which the Amendments were ratified), it is highly doubtful that the ratifying legislatures would have viewed the misapplication by state courts of a novel tool of procedure – obviating a litigant's access to a trial by jury – as mere harmless error, or something that constituted "due process of law." In such a light, it can be argued that no mere

---

[122] Under the old equity rules it had been held that the *absolute right to a trial of the facts by a jury* could not be impaired, even by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. *Hipp v. Babin*, 60 U.S. (19 How.) 271, 278 (1857). The Seventh Amendment was interpreted to mean that equitable and legal issues could not be tried in the same suit, so that such aid, in the federal courts, had to be sought in separate proceedings. *Scott v. Neely*, 140 U.S. 106, 109 (1891); *Bennett v. Butterworth*, 52 U.S. (11 How.) 669 (1850); *Lewis v. Cocks*, 90 U.S. (23 Wall.) 466, 470 (1874); *Killian v. Ebbinghaus*, 110 U.S. 568, 573 (1884); *Buzard v. Houston*, 119 U.S. 347, 351 (1886). See also *Ross v. Bernhard*, 396 U.S. 531, 539-540 (1970).

[123] *Hipp v. Babin*, 60 U.S. (19 How.) 271, 278 (1857).

[124] See FED.R.CIV.P. 56, NOTES OF ADVISORY COMMITTEE ON RULES (Amended Mar. 19, 1948; July 1, 1963; Aug. 1, 1987); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 12-15 (3d ed., Aspen Publishers 2006).

establishment of a procedure – especially in cases where such procedure is misapplied – will sanction any court's infringement of the right to a trial by jury as it must have been understood by the ratifying legislatures. Support for such an argument can be found in *Ross v. Bernhard*,[125] where this Honorable Court held that the right to a jury trial *depends* on the nature of *the issue to be tried* rather than the procedural framework in which it is raised.[126]

As was noted in the argument above, the primary purpose of the Amendment was to *preserve* the historic line separating the province of the jury from that of the judge, without presumably preventing procedural improvement which did not transgress this line.[127] Elucidating this principle of law, this Honorable Court has made many rulings protecting the right to a trial in its association with the presence of a triable issue of fact.[128] Furthermore, due process has more recently been recognized by this Honorable Court to directly refer to a process of law that can show the sanction of settled usage both in England and in the United States.[129]

---

[125] 396 U.S. 531 (1970).

[126] *Id.* at 539-540.

[127] *Id.*

[128] E.g., *Vicksburg & Meridian R.R. v. Putnam*, 118 U.S. 545, 553 (1886); *U.S. v. Philadelphia & Reading R.R.*, 123 U.S. 113, 114 (1887); *Carver v. Jackson*, 29 U.S. (4 Pet.) 1, 80 (1830); *Magniac v. Thompson*, 32 U.S. (7 Pet.) 348, 390 (1833); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 131 (1852); *Transportation Line v. Hope*, 95 U.S. 297, 302 (1877); *Games v. Dunn*, 39 U.S. (14 Pet.) 322, 327 (1840).

[129] *Bennis v. Michigan*, 516 U.S. 442, 116 S. Ct. 994, 134 L. Ed. 2d 68 (1996); *Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990).

(B) The right to a trial by jury of all triable issues, referenced in the Seventh Amendment, should also be seen as a guaranteed in actions before state courts by operation of the Fourteenth Amendment.

After noting that the due process clause, by reason of its operation upon "all the powers of government, legislative as well as executive and judicial," could not be appraised solely in terms of the "sanction of settled usage," Justice Mathews, speaking for this Honorable Court in *Hurtado v. California*,[130] declared that:

> Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, *is not law*, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are *essential* to the preservation of public and private rights, *notwithstanding the representative character of our political institutions.* The enforcement of these limitations by judicial process is the device of self–governing communities to protect the rights of *individuals* and minorities, as well against the power of numbers, as against the violence of *public agents transcending the limits of lawful authority*, even when acting in the name and wielding the force of the government.[131]

---

[130] 110 U.S. 516, 528, 532, 536 (1884).

[131] *Id* (emphasis added).

If "lawful authority" is to be understood in terms of due process of law and the rule of law as such has been understood even at common law, it is Petitioner's contention that the principles of due process embodied in the common law practice of separating for the jury all issue of fact is itself fundamental to the "enforcement of [liberty] by judicial process"[132] and that such has long been understood as an understood "device of self–governing communities,"[133] particularly where the people have, long before the adoption of the Constitution, understood a jury of their peers to occupy the governing role in settling issues of fact. Support for this argument, realizing a nexus between the concept of "trial" itself and due process, can me found in *U.S. v. Olano*,[134] where, according to other definitions, due process was taken to include the proposition that no error may be found harmless if said error deprives a litigant of the basic protections within which a trial can serve its function.[135]

II. Petitioner was denied due process of law, guaranteed by Section One of the Fourteenth Amendment, when the State Courts in question did not follow the

---

[132] *Id.*

[133] *Id.* See also *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R.2d 1396 (1952) (holding that the phrase "due process of law" is the summarized constitutional guaranty of respect for those personal immunities that are so rooted in the traditions and conscience of the American people as to be ranked as fundamental or are implicit in the concept of ordered liberty).

[134] 507 U.S. 725, 735 (1993).

[135] *Id.*

State's own recognition of the right to trial in a civil case.

The courts of State of New York, as well as the New York State Constitution, recognize a right to trial of all issues of fact in a case for damages.[136] By failing to apply such protections in Petitioner's case,[137] the Courts in question denied Petitioner the regular application[138] of "the law of the land," and thereby violated his right to due process of law.[139]

III. The Courts in question violated Petitioners right to due process of law in upholding a grant of summary judgment, which was reached on issues presented for the first time in Respondent's reply papers, and in otherwise failing to allow Petitioner meaningful response.

Although the courts of the State of New York have readily held that it is a violation of a litigant's right to due process of law to have issues determined on motion which were placed before the court in the reply papers,[140] an argument can be made from

---

[136] *Esteve v. Abad*, 271 A.D. 725, 727, 68 N.Y.S.2d 322, 324 (1st Dep't 1947) (holding that a triable issue of fact relates to a Constitutional and fundamental right to trial by jury, which *no court* can take away); *Closson v. Seaboard Sand & Gravel Corp.*, 238 A.D. 584, 586, 265 N.Y.S. 160, 162 (1st Dep't 1933); N.Y.CONST. art. I § 2.

[137] Pet. 2-22, *supra*.

[138] *Hurtado v. People of State of Cal.*, 110 U.S. 516, 528, 532, 536 (1884).

[139] *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 4 S. Ct. 663, 28 L.Ed. 569 (1884).

[140] *Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 561-562, 582 N.Y.S.2d 712, 713 (1st Dep't 1992); *Falk v. Goodman*, 7 N.Y.2d 87, 91, 195 N.Y.S.2d 645, 647, 163 N.E.2d 871, 873 (1959).

general principles of due process, Nationally understood, that the practice is violative of due process. As due process of law requires that a litigant be offered an opportunity to refute all evidence the merits of her case,[141] and as the raising of an issue in the reply papers disallows the litigant moved against the opportunity to respond,[142] a determination made by a court on such necessarily deprives said party of due process.

Furthermore, due process of law requires the impartiality of the tribunal,[143] and as the Motion Court in the present case had already determined the issue presented in the reply papers in favor of Respondent,[144] the hearing conducted on the motion, which was itself improper,[145] was not only impartial, which is seen from the great lengths the Motion Court went through to interpret inferences in favor of the moving party,[146] but also did not provide Petitioner meaningful response by its actions.[147]

CONCLUSION

Given the above-stated arguments and points of law, and considering the presence of the issues upon the record before this Honorable Court, it is

---

[141] *Clifford v. U.S.*, 136 F.3d 144, 329 U.S.App.D.C. 1, 5-6 (D.C. Cir. 1998).

[142] *Lumbermens Mut. Cas. Co. v. Morse Shoe Co.*, 218 A.D.2d 624, 626, 630 N.Y.S.2d 1003, 1004-1005 (1st Dep't 1995).

[143] *Hampton v. Mow Sun Wong*, 426 U.S. 88, 99-105 (1976). See also *U.S. v. Olano*, 507 U.S. 725 (1993); *Smith v. Phillips*, 455 U.S. 209, 213 (1982).

[144] Pet. 2-16, *supra*.

[145] *Esteve v. Abad*, 271 A.D. 725, 727, 68 N.Y.S.2d 322, 324 (1st Dep't 1947).

[146] Pet. 2-16, *supra*.

[147] *Id.*

respectfully requested that this Honorable Court grant Petitioner's application for a writ of certiorari.

Respectfully submitted.

ANATTA LEVINSKY
Counsel of Record
LAW OFFICES OF ANATTA LEVINSKY, P.C.
6924 BAY PARKWAY
BROOKLYN, NEW YORK 11204
(718) 837-9700

APPENDIX A

11 N.Y.3d 827, 897 N.E.2d 1079, 868 N.Y.S.2d 595

Mark Hynes, Appellant,
v
Sonido, Inc., Respondent.

Court of Appeals of New York
Submitted August 25, 2008
Decided October 28, 2008

Reported below, 50 AD3d 314.

On the Court's own motion, appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved. Motion for leave to appeal denied.

Copr. (c) 2009, Secretary of State, State of New York.

NY, 2008.
Hynes v Sonido, Inc.
11 N.Y.3d 827, 897 N.E.2d 1079, 868 N.Y.S.2d 595

APPENDIX B

Mark Hynes, Appellant
v
Sonido, Inc., Respondent.
Supreme Court, Appellate Division, First Department, New York
April 3, 2008

CITE TITLE AS: Hynes v Sonido, Inc.

HEADNOTE

Contracts
Breach or Performance of Contract

The Law Offices of Anatta Levinksy, P.C., Brooklyn (Robert M. Shafran of counsel), for appellant.

The Law Offices of Stuart A. Jackson, P.C., New York (Christelle Clement of counsel), for respondent.

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered February 9, 2007, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

On February 10, 1997, the parties signed an agreement reading in its entirety: "IT IS HEREBY STIPULATED AND AGREED BY AND BETWEEN SONIDO, INC. AND MARK T. HYNES, THAT SONIDO, INC., WILL PAY MARK T. HYNES, TEN PERCENT '10 (%)' OF ALL SALES MADE AND PAID FOR VIA THE INTERNET, OF MUSIC, VIDEOS, ART, WORDS AND ADVERTISEMENT."

We reject plaintiff's expansive interpretation upon an examination of the intent of the parties within the four corners of the *315 agreement, as well as the circumstances under which it was executed. Considering the allegation in the complaint of breach by failure to pay the percentage of income from Internet sales, the circumstances under which the agreement was executed and the relationship between the parties, the relevant contract term-"TEN PERCENT '10 (%)' OF ALL SALES MADE AND PAID FOR VIA THE INTERNET"-is unambiguous. Indeed, under plaintiff's proffered interpretation of the agreement, he would be entitled to a percentage of not only the sales made by defendant, but also of any royalties received. Such an arrangement is clearly not contemplated by the plain language of the agreement.**2

We have considered plaintiff's remaining contentions and find them unavailing. Concur-Saxe, J.P., Sweeny, McGuire and Acosta, JJ.

Copr. (c) 2009, Secretary of State, State of New York

NY,2008.
Hynes v Sonido, Inc.
50 A.D.3d 314, 855 N.Y.S.2d 83, 2008 N.Y. Slip Op. 03060

APPENDIX C

Supreme Court of the State of New York – New York County

PRESENT: IRA GAMMERMAN PART 27
Justice

Index No._____
Index Number: 604046/2000 Motion Date _____
HYNES, MARK T. Motion Seq. No.____
vs Motion Cal. No. ____

SONIDO, INC.
Sequence Number: 002
SUMMARY JUDGMENT this motion to/for _____

Notice of Motion/Order to Show Cause – Affidavits – Exhibits_____	PAPERS NUMBERED _____
Answering Affidavits – Exhibits_____	_____
Replying Affidavits_____	_____

CROSS-MOTION: ___ **YES** ___ **NO**

Upon the foregoing papers, it is ordered that this motion is granted. See record.[1] s/ J. Allocca.

It is So Ordered
Enter.

---

[1] The Order of the Supreme Court of the State of New York, New York County incorporates, by this reference, the transcript of the proceedings in question. Such are reprinted at App. 6-31, *infra*.

FILED
FEB – 9 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/5/07 s/ IRA GAMMERMAN JHO
IRA GAMMERMAN ~~J.S.C.~~[2]

Check one: X FINAL DISPOSITION
__ NON-FINAL DISPOSITION
Check if appropriate: __ DO NOT POST
__ REFERENCE

16758

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):[3]

_____

_____

[2] On the original form that comprises the Order in question, the Judicial Hearing Officer struck through the abbreviation "J.S.C."

[3] This portion of the form that comprises the Order in question is printed vertically in the right margin of the original.

APPENDIX D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART 27

----------X

MARK HYNES,

Plaintiff,

-against-

INDEX NUMBER:
604046/00

SONIDO, INC.,

Defendant.

----------X

60 Centre Street
New York, New York
February 5, 2007

BEFORE:

HONORABLE IRA GAMMERMAN,
Judicial Hearing Officer

APPEARANCES:

IRVING SINGER, ESQ.
Attorney for the Plaintiff
54 Main Street
Third Floor
Hempstead, New York 11550

STUART A. JACKSON, P.C.
Attorneys for the Defendant
70 East 55th Street
New York, New York 10022-3322
By: STUART A JACKSON, ESQ., Of Counsel
CHRISTELLE CLEMENT, ESQ., Of Counsel

FILED
FEB 21 2007
NEW YORK
COUNTY CLERK'S OFFICE

JAMES V. ALLOCCA, CSR
OFFICIAL COURT REPORTER

THE COURT: This case is 16756.

That is my computer number.

It is helpful, if there are any further submissions, that that number is placed on whatever is submitted.

This is a claim by the plaintiff under an agreement that was entered into between the plaintiff and the defendant, under the terms of which the plaintiff claims to be entitled to ten percent of any earnings realized by the defendant in connection with sales made via the Internet.

The case was initially before me back in 2001, when the issue that was raised, at that time, was a claimed release executed by the plaintiff, which the plaintiff maintained was a forgery.

I directed the attorney for the defendant to file an order with notice of entry with the Legal Support Office to obtain a date on the Referee's calendar so that the Referee could, hopefully, make a determination with respect to the genuineness of the release.

That was done on the 8th of January 2003, and apparently, such a reference was made, and the Referee, Marion Lewis, decided that she couldn't resolve the issue, but neither party, subsequent to the Referee issuing a report, made a motion to either confirm or disaffirm the report, indeed, the case remained dormant thereafter until the defendant recently made a motion for summary judgment,

claiming that the evidence established that there was no breach of the Agreement inasmuch as there were no Internet sales made by the defendant.

The papers that were submitted by the plaintiff and the defendant, in my view, raised an issue of fact, the defendant, offering an affidavit from an officer of the company indicating that no Internet sales were made, and the Plaintiff submitting an affidavit from himself indicating that he had evidence of Internet sales made by the defendant.

It seemed to me that, perhaps, a hearing on that one issue – because it seems to me that that issue is determinative of the motion – would be appropriate.

So, I have asked counsel to appear today, and it seems to me that I'm interested, primarily, in the evidence that the plaintiff has that the defendant has made Internet sales.

Why don't we have him testify.

Come up, Mr. Hynes.

MR. SINGER: Your Honor, wouldn't it be more appropriate, under a summary judgment motion – I say this very carefully – that they bring forth the basis for summary judgment?

THE COURT: The basis is the affidavit, and the only issue that is created is a one sentence statement in the affidavit, submitted by your client, in which he says, in paragraph 12, this, which seems to me somewhat contradictory.

In paragraph 11, he says, "The corporation should be receiving payment from Sony, Warner, BMG, Atlantic, Q-PASS, SoundExchange, and various other entities, including Apple Corporation."

In paragraph 12, he says, "At this time, I can state that the company has made sales of millions of records, CDs, or more over the Internet."

As I interpret this agreement, the sales have to be made by the defendant, not by a customer of the defendant, and I presume that Sony, Warner, BMG, et cetera, are customers of the defendant.

MR. SINGER: We go a step further.

THE COURT: Well, no.

I want to find out what evidence there is that the defendant, Sonido, Inc., has made Internet sales.

MR. SINGER: If I may –

THE COURT: Go ahead, counsel.

MR. SINGER: – if you recall, when we approached the bench the other day, I asked one question about the canon of ethics, whether Mr. Jackson could be the attorney on this case.

THE COURT: I'm not going to get involved in that, at this point.

MR. SINGER: No, it has something to do with the fact pattern.

THE COURT: Go ahead.

MR. SINGER: It's been a statement by Mr. Jackson, only by him, the company has sold –

THE COURT: Counselor, I have an affidavit – I'm not relying on anything Mr. Jackson said to me.

I have an affidavit from Maggie, B-U-R-B-A-N-O, who says, in her affidavit, that she's the vice-president of the company, and the company has made no Internet sales.

MR. SINGER: I would like to call her first.

THE COURT: Let's see if there is any evidence from your client as to whether or not there are Internet sales.

If he has evidence, fine, that creates an issue of fact, and I will deny the motion for summary judgment.

We don't need that.

We have an affidavit from the vice-president of the company saying that they haven't made Internet sales.

I'm not here to evaluate credibility.

I want to see what evidence there is that the company has made Internet sales.

If there is evidence that the company has made Internet sales, then we have an issue of fact.

MR. SINGER: I don't disagree.

THE COURT: Come up, Mr. Hynes.

Raise your right hand.

MARK HYNES,
residing at 117 Kent Road, Valley Stream, New York 11580, the plaintiff herein, having been first duly sworn, was examined, and testified as follows:

THE COURT: In a loud and clear voice, give your name and your address to the court reporter.

THE WITNESS: Mark Hynes –

THE COURT: H-Y-N-E-S?

THE WITNESS: With a "Y," yes.

THE COURT: Where do you live?

THE WITNESS: 117 Kent Road, Valley Stream, New York 11580.

THE COURT: Go ahead, counselor.

DIRECT EXAMINATION

BY MR. SINGER:

Q Mr. Hynes, are you familiar with SoundExchange?

A Yes, sir.

Q What is SoundExchange?

A It's a nonprofit organization that collects royalties for webcasters and online services, for companies that have publishing rights.

Q Now, when did – when was the company established?

A I believe 1998.

Q And, by whom was it established?

A By the U.S. Copyright Office.

Q And, what does it do now?

A It collects royalties for – royalties paid by non-interactive subscription and non-subscription services.

Q Have you been able to discover whether Sonido receives royalties through them?

A The only thing I could –

THE COURT: Let's assume it has.
That is not the issue, counselor.
The issue is whether or not the royalties it received relate to Internet sales made by the Defendant.

MR. SINGER: That is what I'm getting to.

THE COURT: No, no, counselor.
Let's move on.

A Well –

THE COURT: Stop talking.

Q Who does SoundExchange collect the money from?

A It says right here it collects it from satellite radio, Sirius, television, music services, independent labels, webcasters –

THE COURT: Ok.

A – digital cable –

THE COURT: Right.

A – satellite music services –

THE COURT: All right.

Q What are those services?

THE COURT: Are those Internet services?

THE WITNESS: Some of them are.

MR. JACKSON: Some of them are.

THE COURT: Some of them are.
Counselor, we don't know – that doesn't mean that the sales are made directly by the defendant –

THE WITNESS: Well –

THE COURT: – stop talking – that the sale was made directly by the defendant to a particular customer.
That is what I want to establish.

MR. SINGER: Okay.

Q Does MSN sell downloadable Sonido music?

A Yes, sir.

Q Who do they pay the royalties to –

A I don't know.

Q – MSN Music?

THE COURT: MSN Music?

THE WITNESS: I don't know who they pay to. MSN Music or iTunes.

THE COURT: Let's take iTunes.

Q Does iTunes have Sonido on it?

A They have Sonido music, correct?

Q Do they pay to Sonido?
A I'm not familiar with that contract.

Q How about Sprint?

A Sprint also has Sonido?

THE COURT: Counselor, there is no question that Sonido music is sold over the Internet.

If you buy music from iTunes – and I've bought music from iTunes – you buy it over the Internet.

There is no question about that.

MR. SINGER: The issue that you are raising is the problem that I'm having, your Honor, and not with him.

It's the next question that I have to ask.

THE COURT: Ask whatever question you want.

MR. SINGER: I have to call Mr. Jackson to the stand.

THE COURT: Just a minute.

I take it – do you have any evidence –

THE WITNESS: Yes, sir.

THE COURT: – let me ask you the question – that Sonido directly has sold any of its music over the Internet?

THE WITNESS: Yes, sir.

THE COURT: What evidence do you have?

THE WITNESS: SoundExchange says, on page 2 here, "our sound recording company copyright owner members include Sonido, Inc."

THE COURT: There is no question about that Sonido music is sold over the Internet, and Sonido receives –

THE WITNESS: Royalties for that music.

THE COURT: Right.
The question is, who is selling it?
Is Sonido selling it, or is someone else selling it?

THE WITNESS: They would have to sell it by license.
They would have to license someone else to sell it.
They don't just let somebody take a CD and put it on the Internet, because they have to give permission to somebody.

THE COURT: Do we know they gave permission directly to – what, iTunes?

A iTunes or SoundExchange.
They would have to, or it would be illegal for them to be downloading –

THE COURT: There could be an intermediary, could there not?

THE WITNESS: I don't know.

THE COURT: Could there not?

MR. SINGER: Your Honor, I may –

THE COURT: I'm asking the question of the witness.

THE WITNESS: There could be.

THE COURT: Ok.

MR. SINGER: I would refer your Honor, and I'm sure you do know the case of Capitol Records versus Nexos of America, 5 NY3d 540, Court of Appeals, in which the copyright law requires – and this is the problem that I have – that there be a license to sell by the person who owns the right.

THE COURT: Counselor, I've got many, many license agreements, or many cases involving license agreements, and the owner of a license can give it to another person, and that other person can sell it.

MR. SINGER: That is why I want to call Mr. Jackson.

THE COURT: All right.
At this point you think you can establish that through Mr. Jackson?

MR. SINGER: Absolutely, sir.

THE COURT: Okay, step down.
(Witness excused.)

THE COURT: Come up Mr. Jackson.

MR. JACKSON: By the way, Judge, I did bring Ms. Burbano in case you care to enquire of her.

THE COURT: Mr. Singer wants to question you. Raise your right hand.

STUART A. JACKSON,
residing at 24 Yale Drive, Manhasset, New York, called as a witness by and on behalf of Plaintiff herein, having been first duly sworn, was examined, and testified as follows:

THE COURT: Sit down, please.
In a loud and clear voice, give your name and address to the court reporter.

THE WITNESS: Stuart, S-T-U-A-R-T, A. Jackson.

THE COURT: Your address?

THE WITNESS: Twenty-four Yale Drive, Manhasset, New York.

THE COURT: Go ahead, counselor.

DIRECT EXAMINATION

BY MR. SINGER:

Q Mr. Jackson, have you stated that Sonido is, basically, out of business to me?

A Yes, sir, I have.

Q Did you tell me that it sold all its rights in records, or whatever, to another company?

A I did.

Q Did you also tell me that that is a secret agreement that you could not reveal to me?

A The agreement has a confidentiality provision, and, as such, the sellers of its assets, honor that confidentiality provision.

THE COURT: Excuse me for a moment.
(Pause in the proceedings.)

THE COURT: Go ahead.

Q And part of the assets of Sonido, Inc. was licenses of the artists' records and what not?

MR. SINGER: I would like these to be marked.

THE COURT: Just ask him.
Sonido had certain rights, publishing rights, with respect to certain music?

THE WITNESS: Yes, sir, it did.

THE COURT: Was that sold to another company?

THE WITNESS: Yes, sir.

Q Did they have all the rights –

A Did Sonido have all the rights?

Q – that were connected from those licenses with the artists?

A Well, we did not make a representation that we had all of the rights for all of the artists that we represented.
We sold all of the rights we had.

Q And, those rights would include, let's say, publishing; is that correct?

A Publishing, we sold publishing, and reproduction.

Q And, records?

A Yes, sir.

Q And, CDs?

A Yes, sir.

Q And, the rights to sell on the Internet?

A All rights, sir.

Q Well, one of the rights was, when you sold it – what year did you make the sale?

A July 2005.

Q And, what was the method that they bought to sell the records by?

A I don't understand your question.

Q Well, did you limit it in any way that they couldn't sell on the Internet?

A We made no limitations whatsoever, sir. Whatever rights we had, we transferred.

Q So, if the music was sold by the Internet method, this is a sale of all the Internet rights of Sonido, is that correct, at that contract?

A Well –

Q Yes or no?

THE COURT: Sonido never sold on the Internet.

Q When you sold the rights that Sonido had, wasn't this all the rights?

THE COURT: The purchaser of the rights had the right, no question about it, to sell whatever it wanted over the Internet.
Let's move on.

Q And, by that method, you made the entire Sonido collection sale of the Internet rights, is that not correct?

THE COURT: Sustained.
Counselor, that is not right.
Sonido sold whatever rights it had in this music.
It sold whatever assets it had.
If it had assets such as CDs, or sheet music, whatever it had, to another company, the other company, presumably, is selling over the Internet.
There is no question about that.
The question is, Sonido is not doing that.

MR. SINGER: When it made its sale, that is –

THE COURT: That is the basis of your claim?
MR. SINGER: No.

Q When did you become vice-president of the corporation?

A I'm the vice-president.

Q When did you become the vice-president now?

A In connection with the sale.

Q What date was that?

A Approximately July 2005.

Q Do you know if it ever made any sales prior to that date?

A I know it did not?

Q How do you know it never made sales?

THE COURT: Counselor, the affidavit says it did not, and I don't see any evidence that it did. That is my question.

MR. SINGER: Your Honor, under – they have – they are not ready to –

Q Who is the – who was the president of Sonido at the time you became vice-president?

A At the time that I became vice-president, the president was Victor Gallo, G-A-L-L-O.

Q Did he ever state that he never made any sales on the Internet?

A Yes, sir.

Q When?

A Perhaps several years earlier.

Q Do you have an affidavit to that nature?

A He didn't give me an affidavit, but I have his longtime co-employee here today.

THE COURT: The person who executed the affidavit?

THE WITNESS: The person who executed the affidavit, was employed with Gallo for 20 some-odd years, worked hand in glove with him.
She told me.

THE COURT: She will testify, too.

MR. SINGER: I will call her next.

THE COURT: Do you have any other questions of Mr. Jackson?

MR. SINGER: None.

THE COURT: You can step down.
(Witness excused.)

THE COURT: Come up, please.
Raise your right hand.

MAGGIE BURBANO,
residing at 7336 Kennedy Boulevard, North Bergen, New Jersey 07047, called as a witness by and on behalf of Plaintiff herein, having first been duly sworn, was examined, and testified as follows:

THE COURT: Sit down, please.
In a loud and clear voice, give your name and address to the court reporter.

THE WITNESS: My name is Maggie, M-A-G-G-I-E, last name, Burbano, B-U-R-B-A-N-O.

THE COURT: Your address?

THE WITNESS: 7336 Kennedy Boulevard, North Bergen, New Jersey 07047.

DIRECT EXAMINATION

BY MR. SINGER:

Q What is your position for the company?

A Vice-president.

Q How many vice-presidents do they have?

A I became vice-president after –

MR. JACKSON: Listen to the question.

THE COURT: Who else is vice-president besides you?

That is the question.

THE WITNESS: Nobody else.

THE COURT: Go ahead.

Q Who is the president?

THE COURT: Who is the president of the company?

THE WITNESS: Mr. Jackson.

Q When did he become president?

A That is – after the sale of the company.

THE COURT: After the sale of the company.

Q Did he, in any way, run any of the operations of the company prior to its sale?

A Excuse me?

THE COURT: Did he run the company before he became president?

THE WITNESS: No.

Q Who ran the company before he became president?

A Victor Gallo.

Q And, where is Victor Gallo?

A I have no idea.

THE COURT: How long have you been affiliated with the company?

THE WITNESS: Around 21, 22 years.

THE COURT: What position did you hold when you first became affiliated with the company?

THE WITNESS: I was doing different duties in the company, accounting, bookkeeping.

Q Did you have any knowledge of its contracts?

A Which contracts?
I don't know which contract we are talking about.

THE COURT: I assume the company sold music.

THE WITNESS: Yes.

Q Do you know – do you know what it said in its contract for the sale of music?
Was there a standard contract?

A As far as I know, no, there was no contract with wholesale.
We just sold the music to our customers.

Q Who were your customers?

A We have, like, around ten customers.

THE COURT: What is that?

THE WITNESS: We have around ten customers that we sold music –

Q What were there names?

MR. JACKSON: Your Honor –

THE COURT: What were the names of your customers?

MR. JACKSON: Your Honor – we have hundreds, your Honor.

THE COURT: Any name.

A Any names – I can provide some.
As an example, R-E-Y-E-S, Records, H & L Distributors, Aponte, A-P-O-N-T-E, Distributors, Pacific Music –

THE COURT: All right, that is enough.
Anything else?

Q Did you ever hear of Sound Off Exchange?

A I heard the name, but we haven't – have no contracts with selling CDs to SoundExchange.

Q They're an outfit that collects money on the Internet for the sales of records?

THE COURT: For the sale of music?

Q For the sale of music?

A No.

Q Never got a check from them – from them?

A We got – a check was related with the music, the use on the Internet, not the sale – the CDs on the Internet, if there is any, not the sales.

We haven't sold one, not one CD, to SoundExchange.

Q But, you did get money for the use of music on the Internet, isn't that correct?

A I'm not sure.

I have to check on that.

I'm not sure.

Q Well, how about any other – how about Yahoo –

A Yahoo?

No.

Q Amazon?

A No.

Q MSN?

A No.

Q Never received a check?

A Never.

Q But, you don't know about Sound Off, yes or no?

A About what?

Q The use – you said – well, you testified that you got money from them, right, SoundExchange?

MR. JACKSON: She did not so testify.

MR. SINGER: Please, your Honor.

THE COURT: Please.
Say, "objection," nothing else.

A SoundExchange, I have to check.
I remember seeing something – I'm not sure about that.

THE COURT: But, counselor, that doesn't prove anything.
The problem you have is that, as I interpret this contract, you have to prove direct sales, by the defendant, over the Internet.
That was the purpose of this contract, as I understand it.
Your client was setting up a software, and perhaps hardware as well, that would enable the company, if it decided to go into the business of selling music over the Internet, to do so, and, in exchange for his services, he had to get ten percent of any of the monies realized from that sale or those sales.
You have to establish that the company made those sales, not that anybody else made those sales.

Q Did – eventually, Sonido, was it sold to somebody?

THE COURT: It was sold in 2005, according to the testimony.

Q What was the contract for that sale?

A The sale of assets, music, and publishing.

Q And, did – that include the Internet price?

THE COURT: Counselor, there is nothing that prevented whoever bought the assets and rights of the defendant from selling music over the Internet.
That's been established.
That is stipulated.

MR. SINGER: That is stipulated?

THE COURT: Absolutely.

MR. SINGER: Then I would like to be heard on the legal argument to what the issue –

THE COURT: Your position, as I understand it, if the company sold its assets to XYZ Company, and XYZ sold music over the Internet, your client is entitled to the money that the company received from XYZ when it sold the rights?

MR. SINGER: No, ten percent of the rights of the Internet sales.
What I am saying to you, your Honor, if you could, just imagine there is a property right.
When Sonido sells all its assets, part of it is a right called the Internet sales.
He is entitled to that portion.

THE COURT: I disagree with you completely.
Your position, as I understand it, is that in some way, this contract entitles your client to a share of, presumably, what Sonido received in 2005 when it

sold its rights because some of the Sonido music that it sold to its customer, or the purchaser of its assets and rights, is using that music in connection with sales made over the Internet.

MR. SINGER: That is correct, your Honor.

THE COURT: That is not what the contract says.

The contract says, sales by Sonido.

That is not a sale by Sonido, counselor.

MR. SINGER: That is the plaintiff's case, your Honor.

THE COURT: All right.

The motion is granted.

The complaint is dismissed.

The clerk is directed to enter an appropriate judgment.

Thank you both very much.

***[4]

I DO HEREBY CERTIFY that the foregoing is a true and accurate transcription of the original stenographic notes.

s/ James V. Allocca C.S.R.
James V. Allocca, C.S.R.
Official Court Reporter

---

[4] In the original transcript of the proceedings three asterisks appear. Such should not be confused with the use of asterisks in this Appendix which indicate a break in the portions of the document transmitted to the Appendix.

EXHIBITS

MARK HYNES.....6
DIRECT EXAMINATION
BY MR. SINGER: 7

STUART A. JACKSON.....12
DIRECT EXAMINATION
BY MR. SINGER: 13

MAGGIE BURBANO.....18
DIRECT EXAMINATION
BY MR. SINGER: 19

FILED
FEB 21 2007
NEW YORK
COUNTY CLERK'S OFFICE

APPENDIX E

Hynes v Sonido, Inc.

Motion No: M-2283

Slip Opinion No: 2008 NYSlipOp 77720(U)

Decided on July 15, 2008

Appellate Division, First Department,
Motion Decision

Published by New York State Law Reporting Bureau
pursuant to Judiciary Law § 431.

This motion is uncorrected and is not subject to
publication in the Official Reports.

July 15, 2008

Hynes v Sonido, Inc.

Reargument or other relief denied.

Before: Saxe, J.P., Sweeny, McGuire, Acosta, JJ.

Motion No. M-2283

APPENDIX F

Mark Hynes v Sonido, Inc.

Motion No: 2008-1363

Slip Opinion No: 2009 NYSlipOp 61492

Decided on January 22, 2009

Court of Appeals Motion Decision

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

This motion is uncorrected and subject to revision before publication in the Official Reports.

Mark Hynes,
Appellant,

v

Sonido, Inc.,
Respondent.

Motion for reargument denied.

APPENDIX G

U.S.CONST. amend. VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. U.S.CONST. amend. VII.

U.S.CONST. amend. IX:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. U.S.CONST. amend. IX.

U.S.CONST. amend. X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. U.S.CONST. amend. X.

U.S.CONST. amend. XIV § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S.CONST. amend. XIV § 1.

28 U.S.C. 1257(a):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. 28 U.S.C. 1257(a).

APPENDIX H

New York County Clerk's Index No. 604046/2000

NEW YORK SUPREME COURT
APPELLATE DIVISION—FIRST DEPARTMENT

MARK HYNES,
Plaintiff-Appellant,

—against—

SONIDO, INC.,
Defendant-Respondent.

RECORD ON APPEAL

MARK HYNES
117 Kent Road
Valley Stream, New York 11580
(917) 545-4193
Plaintiff-Appellant Pro Se

STEWART A. JACKSON, ESQ.
CRISTELLE CLEMENT, ESQ.
THE LAW OFFICES OF
STEWART A. JACKSON, P.C.
70 East 55th Street
New York, New York 10022-3322
(212) 755-0500

R.E. PARSER & PARTNERS
445 Park Avenue

New York, New York 10022
(212) 752-7555

NIGRONE & RUSSŌ
112 West 31st Street
New York, New York 10001
(212) 563-1930
Attorneys for Defendant-Respondent

REPRODUCED ON RECYCLED PAPER

***

[R. 35-38]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

MARK T. HYNES,
Plaintiff,

-against- **VERIFIED COMPLAINT**

Index No.: 00604046

SONIDO, INC.,
Defendant.

----------X

Plaintiff, complaining of the defendants by his attorney, IRVING SINGER, P.C., alleges the following:

1. At all times plaintiff MARK T. HYNES is a natural person who resides in the State of New York.

2. Defendant SONIDO, INC. (hereinafter Sonido) is a corporation licensed to do business under the laws of the State of New York, and is doing business at 112 West 31st Street, 4th Floor, New York, New York 10001.

3. Gerald Masucci was president on February 10, 1997 of Sonido, Inc. As president he had authority to enter into contracts on behalf of the corporation.

3a. On February 10, 1997, plaintiff and defendant SONID entered into an agreement, through its president and founder GERALD MASUCCI in which defendant SONIDO agreed to pay plaintiff ten (10%) percent of all sales made and paid for via the internet, of music, videos, art, words and

advertisement. (Copy of the contract enclosed as Exhibit A).

3b. There has been no subsequent agreement or release modifying this agreement in any manner.

4. The contract was entered into in the State of New York on February 10, 1997 between Mark T. Hynes and Sonido.

5. Mark T. Hynes entered into a contract with MCI on February 11, 1997 to supply internet Bandwidth for web sites for the contract with Sonido Inc.

6. This contract with MCI was in consideration and performance of the agreement entered on February 11, 1997.

6a. In reliance on this agreement and the president of Sonido statements that he wanted all sales of his Latin Music empire to be sold through the Latin music website, in the year 1997, plaintiff made capital and labor investments worth approximately two hundred fifty thousand ($250,000) dollars including, but not limited to the following:

(a) development of internet websites such as http://www.latinmusic.com and other electronic means to advertise defendants' products and generate sales,

(b) negotiation and implementation of a deal with MCI for the networking of phone, fax and Internet lines at approximately thirteen thousand ($13,000) dollars per year,

(c) purchasing, with plaintiff's own money, hardware, software, and the Real Audio Server,

(d) investment of approximately one thousand (1000) hours of time for which plaintiff received no compensation and for which he could otherwise have billed at the fair and reasonable rate of one hundred fifty ($150) dollars per hour.

7. Mark T. Hynes purchased Real Audio, Intershop, Microsoft web servers, computers, rooters firewall. and verisign software to perform said contract.

8. Mark T. Hynes created by labor and supplies the website known as LatinMusic.Com; subsequent to entering into contract as consideration for contract with Sonido.

9. Sonido used the website as created by Mark T. Hynes without complaint from Sonido as performance of the contract.

10. On October 1997 Sonido made a payment of $13,000 as part performance of the contract to Mark T. Hynes for the firewall.

11. Sonido was using the website created by Mark T. Hynes as performance of the contract.

12. Upon information and belief on November 1997 the magazine Presario TV and Cable published in Argentina stated that the president Jerry Masucci that all Fania material will be distributed by the Latin music website.

13. Upon information and belief Fania is a label owned by Sonido completely and its purpose is for the distribution of Sonido licensed music upon information and belief.

14. Upon information and belief Sonido distributes one percent of all music which is sold worldwide.

15. On February 10, 1997 Sonido was in the business of distributing and manufacturing and licensing Gramophone recordings.

16. It was the intent of the parties that al sales of Sonido products which result in income from any source by the internet method would generate income for Sonido and Mark T. Hynes by the internet method.

17. Upon information and belief Sonido distributes through its labels or licenses for sale through the internet worldwide its product which it owned on February 10, 1997 and agreed to pay 10% of those sales to Mark T. Hynes by the contract entered into by its president and Mark T. Hynes entered on February 10, 1997.

18. All future sales will be paid in the same manner for Sonido product sold by the internet.

19. Mark T. Hynes has demanded performance by Sonido Inc. in payment of all sales pursuant to the contract entered on February 10, 1997.

20. Sonido Inc. has breached said contract by failing to pay 10% of all income from sales made by the internet nationally or globally from licensed material.

21. Upon information and belief said income believed is to be 40 million per year.

22. The plaintiff has been damaged in the sum of $4,000,000.00 per year since the signing of the contract.

23. At the present time the defendant is indebted to the plaintiff damages in the sum of eight (8) million dollars.

24. Plaintiff performed all responsibilities as required by the contracts with the defendant.

25. Defendant SONIDO breached their contracts by using plaintiff's web sites and unauthorized modifications of plaintiff's websites without paying pursuant to said contracts.

WHEREFORE, plaintiff respectfully requests judgment against defendant SONIDO in the amount of eight million ($8,000,000) dollars plus internet [sic] and for such other relief as the court deems just and proper.

IRVING SINGER, P.C.

Attorneys for Plaintiff

By: s/IRVING SINGER
IRVING SINGER
54 Main Street, 3rd Floor
Hempstead, New York 11550
(516) 485-6480

FILED
3/21/01
COUNTY CLERK
NEW YORK COUNTY
AS AN EXHIBIT (1)

***

[R. 254]

IT IS HEREBY STIPULATED AND AGREED BY AND BETWEEN SONIDO, INC. AND MARK T. HYNES, THAT SONIDO, INC., WILL PAY MARK T. HYNES, TEN PERCENT '10 (%)' OF ALL SALES MADE AND PAID FOR VIA THE INTERNET, OF MUSIC, VIDEOS, ART, WORDS AND ADVERTISEMENT.

SWORN HERE BY

DATE: FEBRUARY 10, 1997

GERALD MASUCCI

s/ Gerald Masucci

MARC T. HYNES

s/ Mark T. Hynes

APPENDIX I

To Be Argued By:
ROBERT M. SHAFRAN

New York County Clerk's Index No. 604046/2000

NEW YORK SUPREME COURT
APPELLATE DIVISION – FIRST DEPARTMENT

MARK HYNES,
Plaintiff-Appellant,

-against-

SONIDO, INC.,
Defendant-Respondent.

BRIEF FOR PLAINTIFF-APPELLANT

ROBERT M. SHAFRAN, ESQ.
THE LAW OFFICES OF
ANATTA LEVINSKY, P.C.
6924 Bay Parkway
Brooklyn, New York 11204
(718) 837-9700

Attorneys for Plaintiff-Appellant

REPRODUCED ON RECYCLED PAPER

***

[Brief for Plaintiff-Appellant pp. 1-47]

A CONCISE STATEMENT OF THE QUESTIONS INVOLVED

1. Question: Is it error for a justice of the court to find that an issue of fact was raised in the motion papers of both parties, yet to proceed with summary judgment nonetheless?

It is respectfully submitted that the Lower Court granted the moving party summary judgment despite finding that an issue of material fact was indeed raised in both the papers supporting and opposing the motion for summary judgment, and that such was error.

2. Question: In an action in which the parties have a contract awarding a percentage of the defendant's earnings to the plaintiff, is it appropriate for a justice of the court to treat the issue of no sales being made by the defendant as determinative?

It is respectfully submitted that the Lower Court made this issue the determinative issue of the summary judgment motion, and that such was error.

3. Question: If ambiguity as to the meaning of a term in the contract is raised in the papers opposing a summary judgment motion, and if the party opposing the motion produces evidence in support of its interpretation of the term, is it appropriate for the presiding justice to proceed with summary judgment?

It is respectfully submitted that the Lower Court proceeded with summary judgment despite ambiguity being raised in the papers in support and in opposition to the motion, and that such was error.

4. Question: If a search of the record, as well as a search of the papers for and against the motion, reveals that the moving party breached its contract by repudiating said contract, is it appropriate for a court to grant summary judgment on the issue of breach of contract in favor of the moving party?

It is respectfully submitted that the Lower Court seems to imply that a court may do such, as it reviewed the record, as well as the papers for and against the motion, and granted summary judgment to the Defendant nonetheless, and that such was error.

5. Question: Was it improper for the Lower Court to interpret the contract in a way that ran contrary to First Department and Court of Appeals precedent regarding the rules of contractual construction?

It is respectfully submitted that the Lower Court seemed to imply that such can be done as its decision to make one issue determinative relies upon an interpretation of the contract that was arrived at without following the rules of contractual construction set forth in First Department and Court of Appeals precedent, and that such is error.

A STATEMENT OF THE NATURE OF THE CASE AND THE RELEVANT FACTS

Although the date is disputed, at some time between 1994 and 1996, Jerry Masucci, the President of Sonido, Inc., became interested in modernizing the computer and telephone systems of his corporation. (R. 324 & 210). Jerry Masucci contacted MCI and Microsoft to see who could provide this service to his company. (R. 161& 197). Mr. Masucci was referred to Mark Hynes, a Navy trained specialist in computers,

system administration, data base administration, and communications, who had worked for Case Three Computers in Florida, a Florida police department, Corporate Micros, Lehman Brothers, and Nordic Securities. (R. 196 – 197). Thereafter, Jerry Masucci hired Mark Hynes to perform computer repair and maintenance services, fix computer programs that were not working, install firewalls, and to create a windows-based computer program for bookkeeping at Sonido, Inc. (R. 324, 206 & 210 – 211).

In 1997, Sonido, Inc. and Mark Hynes entered into a contract for the distribution of music through the Internet, as well as for the sale of videos, arts, words, and advertisement. (R. 286 & 307). The contract was written by Jerry Masucci, who was an attorney in addition to being the company's owner. (R. 240). At the time that the contract was executed, the sale of music over the Internet was in an embryonic stage of development with relatively little commercial value as there were not many internet sales of an appreciable value to the consumer. (R. 286). Because of this risk, and because Sonido, Inc. did not want to incur the expenses that were required to build the capacity to sell music on the internet, Sonido, Inc. gave Mark Hynes a ten percent interest in all internet sales in exchange for his developing the Internet project. (R. 206, 286 & 74). The purpose of the contract was to develop a program to repair the faults in Jerry Masucci's billing system, as he allegedly believed that the company was losing money through bookkeeping and other problems, and to set up a program that could be accessed from anywhere in the world. (R. 200 – 204). Mr. Masucci wanted a program that was "fully redundant;" a program that would track everything that went on in his company; a program where entries could not be

deleted, since he allegedly believed that he was losing money to inter-company theft. (R. 203 – 204). The program was also meant to calculate all royalties for artists, authors, publishers, and producers. (R. 202). It was also to be designed to produce invoices, and track all of the manufacturing and contracts of the company. (R. 202). In short, it was to bring everything in the company to Jerry Masucci's fingertips. (R. 202).

At the time of execution, as well as afterwards, Sonido, Inc. was also making plans to become a publicly traded company. (R. 156). Concurrently, Mark Hynes worked for hundreds of hours developing the Internet project, encoding thousands of compact discs from every label of the company's catalog, though he was never paid for these services. (R. 61,194 -195, 224 & 260).

In November of 1997, the magazine, Presario TV and Cable, published an article that quoted Jerry Masucci as stating that all Fania material would be distributed via the Internet. (R. 61 & 70). Shortly thereafter, on December 21, 1997, Jerry Masucci died unexpectedly while in Argentina. (R. 308).

After the death of Jerry Masucci in 1997, Sonido, Inc. claims never to have pursued the development of any website, and never to have sold any music (or any other item) over the Internet. (R. 309). Shortly thereafter, Sonido, Inc. refused Mark Hynes access to its building, and told not to return, although it was the place where he worked on the Internet project. (R. 166 & 230). During this time, Sonido, Inc. attempted to terminate its relationship with Mark Hynes through the use of an instrument that Mark Hynes alleges to be a forgery. (R. 9 & 207 – 208). A copy of the alleged forgery was brought to Mark Hynes by an associate of Sonido, Inc., and when Mark Hynes confronted the then President of Sonido,

Inc., Victor Gallo, about the alleged forgery, he was told by Mr. Gallo that there was a "conflict of interest," and that Mr. Hynes should leave Sonido, Inc.'s building. (R. 207 – 208 & 224 -227). Sonido, Inc. refers to these events as a "discontinuance of [Mark Hynes'] services." (R. 308).

Consequently, Sonido, Inc. never paid any money to Mark Hynes pursuant to the aforementioned contract, although Mark Hynes continued to perform his end of the agreement, and expended numerous resources of time and money in reliance on the contract. (R. 36, 165 – 166, 182, 211 – 212 & 239). Instead of paying Mark Hynes, however, Sonido, Inc. chose to treat Mark Hynes' services as not being company expenses. (R. 189). Sonido, Inc. attempted to terminate its contract, refusing to pay Mark Hynes pursuant to the contract, and ultimately claimed that it had not breached its contract with him, as it had made no Internet sales. (R. 286 & 309).

Mark Hynes started the present action against Sonido, Inc. in 2000 alleging breach of contract. In February of 2001, Sonido, Inc. moved to dismiss Plaintiff-Appellant's Complaint based on an alleged release. The case was initially before the Lower Court in 2001, and issue was raised as to the instrument (a release) alleged to have been executed by the Plaintiff-Appellant, but which the Plaintiff-Appellant claimed was a forgery. (R. 9). The Lower Court then directed the attorney for the Defendant-Respondent to file an order with notice of entry with the Legal Support Office to obtain a date on the Referee's calendar so that the Referee could make a determination with respect to the genuineness of the release. (R. 9). Such reference was made in January of 2003, and the Referee, Marian Lewis, decided that she could not resolve the issue – likewise neither

party made a motion to either confirm or disaffirm the report. (R. 9 -10). The case remained dormant thereafter until, in December of 2006, the Defendant made the motion for summary judgment to which the present appeal refers. (R. 10).

ARGUMENT

POINT ONE:

THE LOWER COURT COMMITTED ERROR WHEN IT GRANTED SUMMARY JUDGMENT DESPITE ITS FINDING THAT AN ISSUE OF FACT WAS RAISED IN BOTH THE PAPERS OPPOSING AND SUPPORTING THE MOTION FOR SUMMARY JUDGMENT

In granting summary judgment, the Lower Court determined that "the papers that were submitted both by the plaintiff and the defendant...raised an issue of fact, the defendant, offering an affidavit from an officer of the company indicating that no Internet sales were made, and the Plaintiff submitting an affidavit for himself indicating that he had evidence of Internet sales made by the defendant." (R. 10). The Lower Court then went on to state, " perhaps, a hearing on that one issue – because it seems...that that issue is determinative of the motion – would be appropriate." (R. 10).

Clearly, this is error on the part of the Lower Court, as once a court has determined that there is an issue of material fact, it must leave the determination of those issues to the fact finder.[5]

---

[5] Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 505, 144 N.E.2d 387, 392 (1957); Esteve v. Abad, 271 A.D. 725, 727, 68 N.Y.S.2d 322, 324 (1st Dep't 1947); Quinn v. Krumland, 179 A.D.2d 448, 449–50, 577 N.Y.S.2d 868 (1st Dep't 1992); Sommer v. Federal Signal Corp., 79 N.Y.2d 540, 554, 583 N.Y.S.2d 957, 963, 593 N.E.2d 1365

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact."[6] Thus, if a single material issue of fact is set forth in the moving or opposing papers, a court must deny the motion and proceed to trial.[7] While summary judgment is the procedural equivalent of a trial,[8] a court does not conduct a trial, but rather, must only determine whether there is an issue to be tried.[9] This rule holds to the point where, if a court, after analyzing the opposing papers, has any doubt at all as to the existence of a material issue of fact (or reasonably deems the facts to be

---

(1992); S. J. Capelin Associates, Inc. v. Globe Mfg. Corp., 34 N.Y.2d 338, 343, 357 N.Y.S.2d 478, 480, 313 N.E.2d 776, 777 (1974).

[6] Quinn v. Krumland, 179 A.D.2d 448, 449–50, 577 N.Y.S.2d 868 (1st Dep't 1992); Sommer v. Federal Signal Corp., 79 N.Y.2d 540, 554, 583 N.Y.S.2d 957, 963, 593 N.E.2d 1365 (1992); S. J. Capelin Associates, Inc. v. Globe Mfg. Corp., 34 N.Y.2d 338, 343, 357 N.Y.S.2d 478, 480, 313 N.E.2d 776, 777 (1974).

[7] Federal Ins. Co. v. Automatic Burglar Alarm Corp., 208 A.D.2d 495, 617 N.Y.S.2d 53 (2d Dep't 1994); Rowan v. Brady, 98 A.D.2d 638, 469 N.Y.S.2d 711 (1st Dep't 1983) (reversing grant of summary judgment on the grounds that the trial court's resolution of the identified issue of fact went beyond issue finding); Missan v. Schoenfeld, 95 A.D.2d 198, 465 N.Y.S.2d 706 (1st Dep't 1983); Wanger v. Zeh, 45 Misc. 2d 93, 256 N.Y.S.2d 227 (Sup 1965), aff'd, 26 A.D.2d 729, 1966 WL 9374 (3d Dep't 1966).

[8] Falk v. Goodman, 7 N.Y.2d 87, 91, 195 N.Y.S.2d 645, 647, 163 N.E.2d 871, 873 (1959); Jones v. U.S. Healthcare, 282 A.D.2d 347, 723 N.Y.S.2d 478 (1st Dep't 2001).

[9] Esteve v. Abad, 271 A.D. 725, 727, 68 N.Y.S.2d 322, 324 (1st Dep't 1947).

arguable), then it must deny summary judgment.[10] If an issue is arguable, trial is needed and the case may not be disposed of summarily.[11] Stated another way, if the papers are such that reasonable minds may disagree on what they lead to, a court's recourse is to deny the motion and remit the parties to the fact trier.[12] Furthermore, if different inferences alone may reasonably be drawn from facts themselves undisputed, the case must go to trial and summary judgment must be denied. Gerard v. Inglese, 11 A.D.2d 381, 206 N.Y.S.2d 879 (2d Dep't 1960). The same is true when a key issue turns on the credibility of opposing affiants. Rickert v. Travelers Ins. Co., 159 A.D.2d 758, 551 N.Y.S.2d 985 (3d Dep't 1990).

Furthermore, it is only after the movant makes a prima facie showing of entitlement to judgment as a matter of law that the burden shifts to the party opposing the motion to produce proof sufficient to require a trial of material questions of fact.[13] Termed another way, there exists a requirement that the evidence produced by the movant "must eliminate material and triable issues of fact," as well as any other doubt regarding the existence of such

---

[10] Phillips v. Joseph Kantor & Co., 31 N.Y.2d 307, 338 N.Y.S.2d 882, 291 N.E.2d 129, 67 A.L.R.3d 961 (1972); Nicholas Di Menna & Sons v. City of New York, 301 N.Y. 118, 92 N.E.2d 918 (1950); Barrett v. Jacobs, 255 N.Y. 520, 175 N.E. 275 (1931); American Home Assur. Co. v. Amerford Intern. Corp., 200 A.D.2d 472, 606 N.Y.S.2d 229 (1st Dep't 1994); Haner v. De Vito, 152 A.D.2d 896, 544 N.Y.S.2d 90 (3d Dep't 1989).

[11] Barrett v. Jacobs, 255 N.Y. 520, 175 N.E. 275 (1931).

[12] Gerard v. Inglese, 11 A.D.2d 381, 206 N.Y.S.2d 879 (2d Dep't 1960).

[13] Sommer v. Federal Signal Corp., 79 N.Y.2d 540, 555, 583 N.Y.S.2d 957, 593 N.E.2d 1365 (1992); Zuckerman v. City of New York, 49 N.Y.2d 557, 563, 427 N.Y.S.2d 595, 598, 404 N.E.2d 718 (1980).

issues.[14] Consequently, if the opposing papers demonstrate that there are any material issues of fact, or that the undisputed facts do not entitle the movant to judgment as a matter of law, the motion must be denied.[15]

New York courts have always been conscious of the need to balance the advantages of an effective summary judgment procedure with a litigant's right to a trial.[16] This Constitutional perspective has led to characterizations of summary judgment as a "drastic remedy,"[17] a "harsh remedy,"[18] "extraordinary relief,"[19] or as a remedy that should be used only "sparingly."[20] Thus, when saved for a proper case, summary judgment is a perfectly

---

[14] Onondaga Soil Testing, Inc. v. Barton, Brown, Clyde & Loguidice, P. C., 69 A.D.2d 984, 416 N.Y.S.2d 116, 117 (4th Dep't 1979); Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 317–318, 476 N.E.2d 642, 643 (1985); Morejon v. Rais Const. Co., 7 N.Y.3d 203, 818 N.Y.S.2d 792, 851 N.E.2d 1143 (2006).

[15] Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 318, 476 N.E.2d 642, 643 (1985); Cugini v. System Lumber Co., Inc., 111 A.D.2d 114, 489 N.Y.S.2d 492 (1st Dep't 1985).

[16] Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 505, 144 N.E.2d 387, 392 (1957); Mason v. Dupont Direct Financial Holdings, Inc., 302 A.D.2d 260, 262, 756 N.Y.S.2d 153, 155 (1st Dep't 2003); Birnbaum v. Hyman, 43 A.D.3d 374, 841 N.Y.S.2d 274 (1st Dep't 2007).

[17] Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 505, 144 N.E.2d 387, 392 (1957); Mason v. Dupont Direct Financial Holdings, Inc., 302 A.D.2d 260, 262, 756 N.Y.S.2d 153, 155 (1st Dep't 2003).

[18] Bakerian v. Horn, 21 A.D.2d 714, 249 N.Y.S.2d 646, 648 (3d Dep't 1964).

[19] Dykstra v. Windridge Condominium One, 175 A.D.2d 482, 572 N.Y.S.2d 527, 528 (3d Dep't 1991).

[20] Christie's v. Gugliarda, 65 A.D.2d 714, 715, 410 N.Y.S.2d 592, 593 (1st Dep't 1978).

Constitutional weapon,[21] and it does not deny the parties their right to a trial – it merely ascertains that there is nothing to try.[22]

In this vein of protecting the non-moving party's right to a trial, the court itself bears a special responsibility to insure that the right to trial of a litigant is protected; when considering a motion for summary judgment, a court must construe the evidence in the light most favorable to the non-moving party. Weiss v. Garfield, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dep't 1964).[23] It is specifically because the function of a court on a motion for summary judgment is issue finding rather than issue determination (or credibility determining), that the proof submitted in opposition to the motion will be accepted as true (and all reasonable inferences will be drawn in favor of the opposing party).[24] Similarly, if a key fact turns on an item of evidence whose admissibility at the trial is arguable, summary judgment must be denied. Gallo Painting, Inc. v. Aetna Insurance Co., 49 A.D.2d 746, 372 N.Y.S.2d 699 (2d Dep't 1975).

These principles underscore the purpose of summary judgment; that "issue-finding rather than

---

[21] Birnbaum v. Hyman, 43 A.D.3d 374, 841 N.Y.S.2d 274 (1st Dep't 2007).

[22] Id.

[23] It should be noted that the Lower Court prevented testimony at times, which would interfere with this function. (R. 15 & 22). In one of these instances, when a witness representing the Defendant-Respondent was equivocal as to an issue of material fact, the Lower Court went as far as preventing the witness' testimony by asserting the Defendant-Respondent's position. (R. 22).

[24] Tortorello v. Carlin, 260 A.D.2d 201, 206, 688 N.Y.S.2d 64, 68 (1st Dep't 1999); Pantote Big Alpha Foods, Inc. v. Schefman, 121 A.D.2d 295, 503 N.Y.S.2d 58 (1st Dep't 1986).

issue-determination is the key to the procedure." Talansky v. Schulman, 2 A.D.3d 355, 770 N.Y.S.2d 48, 51 (1st Dep't 2003); Esteve v. Abad, 271 A.D. 725, 727, 68 N.Y.S.2d 322, 324 (1st Dep't 1947).

As demonstrated by the preceding law, the Lower Court committed clear error by attempting to determine an issue with a hearing, instead of delivering the issue to the fact-finder once it had determined that an issue existed. (R. 10).

POINT TWO:

THE LOWER COURT'S DETERMINATION THAT AN ABSENCE OF SALES (IN A CONTRACT THAT AWARDED A PERCENTAGE OF SALES TO THE PLAINTIFF) WAS DISPOSITIVE ON THE ISSUE OF DAMAGES WAS ERROR

In this section of the Argument, it will be argued that it was error for the Lower Court to hold that the issue of whether or not Sonido, Inc. had made any sales over the Internet was determinative of the motion. (R. 10).

There are at least three reasons why a determination of that question is not determinative of the motion: (1) a cause of action for breach of contract exists in cases where a party breaches its implied obligation to use reasonable efforts to perform its contractual obligations,[25] and as Sonido, Inc. never endeavored to sell any music over the Internet, it breached its contract with the Plaintiff-Appellant; (2) the Defendant-Respondent breached the implied covenant of good faith and fair dealing by never endeavoring to sell music over the Internet;[26]

---

[25] Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917); Middle Village Associates v. Pergament Home Centers, Inc., 184 Misc. 2d 552, 708 N.Y.S.2d 840 (Sup 2000).

[26] 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 746 N.Y.S.2d 131, 773 N.E.2d 496 (2002).

and finally, (3) the hearing, which the Lower Court suggested as the means of determining breach, was itself misguided as the Lower Court was not only disallowed from determining issues of fact, but sought to determine the issue on information exclusively known by the Defendant-Respondent (and knowable by the Plaintiff-Appellant only after discovery).[27]

Because it is required that the movant establish every material fact needed to prove that the movant must succeed as a matter of law,[28] if the Defendant-Respondent was in breach of the contract due to its violating an implied duty (or on any other ground), then the Defendant-Respondent (the movant) should actually lose on the motion as a matter of law. It follows then that merely determining whether or not there were any sales made by Sonido, Inc. will not be determinative of the issue of breach.

As a rule, a motion for summary judgment will be granted only if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.[29] It is the movant who must make a prima

---

[27] Krupp v. Aetna Life & Cas. Co., 103 A.D.2d 252, 479 N.Y.S.2d 992 (2d Dep't 1984); Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 318, 476 N.E.2d 642, 643 (1985); Cugini v. System Lumber Co., Inc., 111 A.D.2d 114, 489 N.Y.S.2d 492 (1st Dep't 1985).

[28] Balanca v. M. Foschi & Sons, Inc., 302 A.D.2d 416, 754 N.Y.S.2d 670, 671 (2d Dep't 2003); SRM Card Shop, Inc. v. 1740 Broadway Associates, L.P., 2 A.D.3d 136, 769 N.Y.S.2d 483, 486 (1st Dep't 2003); Colonna and Co., Inc. v. Citibank, N.A., 86 A.D.2d 789, 447 N.Y.S.2d 10 (1st Dep't 1982). These cases also stand for the proposition that the proof submitted by the movant be in admissible form.

[29] Friends of Animals, Inc. v. Associated Fur Mfrs., Inc., 46 N.Y.2d 1065, 1067, 416 N.Y.S.2d 790, 791, 390 N.E.2d 298

facie showing of entitlement to judgment as a matter of law before summary judgment may be granted.[30] If the burden is not met, a party cannot establish that they should be granted judgment on the grounds that the law is undeniably in their favor, and summary judgment should not be granted.[31]

In what remains of this section, all three grounds stated above for why the issue of whether or not there were any sales is not determinative will be examined in detail – establishing that the Defendant-Respondent should not be granted judgment as a matter of law because the law, instead, favors a finding of breach on the part of the Defendant-Respondent.

1. AS SONIDO, INC. NEVER ENDEAVORED TO SELL ANY MUSIC OVER THE INTERNET, IT BREACHED ITS CONTRACT

(1979); Sommer v. Federal Signal Corp., 79 N.Y.2d 540, 555, 583 N.Y.S.2d 957, 593 N.E.2d 1365 (1992); Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 317–18, 476 N.E.2d 642 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 (1980); Balanca v. M. Foschi & Sons, Inc., 302 A.D.2d 416, 754 N.Y.S.2d 670, 671 (2d Dep't 2003).

[30] It is well settled that on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. For elaboration, please see Sommer v. Federal Signal Corp., 79 N.Y.2d 540, 555, 583 N.Y.S.2d 957, 593 N.E.2d 1365 (1992); Zuckerman v. City of New York, 49 N.Y.2d 557, 563, 427 N.Y.S.2d 595, 598, 404 N.E.2d 718 (1980); Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 925, 501 N.E.2d 572, 574 (1986); Hyman v. Queens County Bancorp, Inc., 307 A.D.2d 984, 763 N.Y.S.2d 669 (2d Dep't 2003); Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 317–18, 476 N.E.2d 642 (1985).

[31] Id.

WITH THE PLAINTIFF BY VIRTUE OF BREACHING THE IMPLIED COVENANT TO USE REASONABLE EFFORTS:

In the present case, the Defendant-Respondent has stated that it never endeavored to sell music through the Internet, and that for that reason it never breached its agreement with Mark Hynes. (R. 300 – 301, 309). As stated above, however, a cause of action for breach of contract exists in cases where a party breaches its implied obligation to use reasonable efforts to perform its contractual obligations.[32]

In an analogous case to the one at bar, it was held that in the case of a publisher that has exclusive rights to publish a book, "the promise to publish ... implies a good faith effort to promote the book. Zilg v. Prentice-Hall, Inc., 717 F.2d 671, 680, 9 Media L. Rep. (BNA) 2257, 43 A.L.R.4th 1163 (2d Cir. 1983).[33]

---

[32] Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917); Middle Village Associates v. Pergament Home Centers, Inc., 184 Misc. 2d 552, 708 N.Y.S.2d 840 (Sup 2000).

[33] Please see also Bloor v. Falstaff Brewing Corp., 601 F.2d 609, 614, 26 U.C.C. Rep. Serv. 281 (2d Cir. 1979) (due to royalty provision, "[e]ven without the best efforts clause [defendant] would have been bound to make a good faith effort to see that substantial sales of [plaintiff's] products were made ..."); G. Golden Associates of Oceanside, Inc. v. Arnold Foods Co., Inc., 870 F. Supp. 472, 476 (E.D.N.Y. 1994) ("where ongoing commissions or royalties are to be paid in an exclusive arrangement, a court will imply a covenant on the part of an exclusive licensee/assignee to exploit the subject matter of the license/assignment with due diligence 'where such a covenant is essential as a matter of equity to give meaning and effect to the contract as a whole'"); Don King Productions, Inc. v. Douglas, 742 F. Supp. 741, 767 (S.D.N.Y. 1990), on reargument, 742 F. Supp. 786 (S.D.N.Y. 1990) ("In the context of agreements granting exclusive promotional or licensing rights, the promoter or exclusive licensee impliedly promises to 'use reasonable efforts to generate profits' for the performer or licensor.").

Furthermore, holding breach of contract for a violation of the duty to use reasonable efforts is especially appropriate in cases where a percentage of the proceeds is the sole consideration that a the non-breaching party will receive. Id.

2. THE DEFENDANT BREACHED THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING BY NEVER ENDEAVORING TO SELL MUSIC OVER THE INTERNET:

Aside from not endeavoring in any way to perform its half of the bargain,[34] Sonido, Inc. also shut Mark Hynes out of the building where he was endeavoring to perform on his portion of the contract (telling him not to come back),[35] and presented Mark Hynes with a forged document in an attempt to avoid its contractual obligations.[36] As these actions and communications clearly thwart the reasonably expected benefit afforded to Mark Hynes in his contract, they breach implied covenant of good faith and fair dealing – breaching the contract itself in the process.[37]

As a rule, all contracts executed in the State of New York contain an implied covenant of good faith and fair dealing in the course of performance. 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 746 N.Y.S.2d 131, 773 N.E.2d 496

---

[34] R. 300 – 301.

[35] R. 166 & 230.

[36] R. 9 & 207 – 208.

[37] New York University v. Continental Ins. Co., 87 N.Y.2d 308, 318, 639 N.Y.S.2d 283, 289, 662 N.E.2d 763, 108 Ed. Law Rep. 342 (1995); Harris v. Provident Life and Acc. Ins. Co., 310 F.3d 73, 80 (2d Cir. 2002); Fasolino Foods Co., Inc. v. Banca Nazionale del Lavoro, 961 F.2d 1052, 1056, 17 U.C.C. Rep. Serv. 2d 561 (2d Cir. 1992).

(2002).[38] The duty to act in good faith under a contract is not a duty separable from the performance of the contract itself. Network Enterprises, Inc. v. APBA Offshore Productions, Inc., 2004 WL 1837349 (S.D.N.Y. 2004). Accordingly, a breach of the implied covenant of good faith and fair dealing is a breach of the underlying contract and does not usually give rise to a separate and independent claim.[39] A reason for this is that the covenant is in aid and furtherance of other terms of the parties' agreement.[40] Its purpose is to further that agreement by protecting a promisee against breach of the reasonable expectations derived from the agreement. ARI and Co., Inc. v. Regent Intern. Corp., 273 F. Supp. 2d 518, 522 (S.D.N.Y. 2003); TVT Records v. Island Def Jam Music Group, 244 F. Supp. 2d 263, 278 (S.D.N.Y. 2003).

The covenant allows a court to read into a contract any promise that a reasonable person in the position of the promisee would justifiably believe was included within the contract. New York University v. Continental Ins. Co., 87 N.Y.2d 308, 318, 639 N.Y.S.2d 283, 289, 662 N.E.2d 763, 108 Ed. Law Rep. 342 (1995).[41]

---

[38] Please see also Smith v. General Acc. Ins. Co., 91 N.Y.2d 648, 652–53, 674 N.Y.S.2d 267, 269, 697 N.E.2d 168 (1998); Dalton v. Educational Testing Service, 87 N.Y.2d 384, 389, 639 N.Y.S.2d 977, 979, 663 N.E.2d 289 (1995).

[39] Harris v. Provident Life and Acc. Ins. Co., 310 F.3d 73, 80 (2d Cir. 2002); Fasolino Foods Co., Inc. v. Banca Nazionale del Lavoro, 961 F.2d 1052, 1056, 17 U.C.C. Rep. Serv. 2d 561 (2d Cir. 1992).

[40] Murphy v. American Home Products Corp., 58 N.Y.2d 293, 304, 461 N.Y.S.2d 232, 237, 448 N.E.2d 86, 31 Fair Empl. Prac. Cas. (BNA) 782, 115 L.R.R.M. (BNA) 4953, 31 Empl. Prac. Dec. (CCH) P 33607, 98 Lab. Cas. (CCH) P 55407 (1983).

[41] Please see also 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 153, 746 N.Y.S.2d 131, 135–136

In particular, the covenant addresses the situation where one party attempts to undermine the contract by taking action that is not explicitly addressed in or forbidden by the language of the contract. Concesionaria DHM, S.A. v. International Finance Corp., 307 F. Supp. 2d 553, 564 (S.D.N.Y. 2004).[42] The implied covenant deems it an undertaking on the part of each party that it will not intentionally or purposely do anything to prevent the other party from performing its obligations under the contract.[43]

Furthermore, a party can breach the implied covenant even if its conduct does not contravene the express provisions within the four corners of the written agreement,[44] as the covenant embraces a pledge that neither party will do anything that will

---

(2002); Dalton v. Educational Testing Service, 87 N.Y.2d 384, 389, 639 N.Y.S.2d 977, 979, 663 N.E.2d 289 (1995); Rowe v. Great Atlantic & Pac. Tea Co., Inc., 46 N.Y.2d 62, 69, 412 N.Y.S.2d 827, 831, 385 N.E.2d 566 (1978).

[42] Sauer v. Xerox Corp., 95 F. Supp. 2d 125, 132 (W.D.N.Y. 2000), judgment aff'd, 5 Fed. Appx. 52 (2d Cir. 2001) ("[S]uch a claim may be brought ... only where one party's conduct, though not breaching the terms of the contract in a technical sense, nonetheless deprived the other party of the benefit of its bargain."); Restatement (Second) of Contracts § 205, comments a, c ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party ...").

[43] Grad v. Roberts, 14 N.Y.2d 70, 75, 248 N.Y.S.2d 633, 637, 198 N.E.2d 26 (1964); Kader v. Paper Software, Inc., 111 F.3d 337, 342, 12 I.E.R. Cas. (BNA) 1329 (2d Cir. 1997); Carvel Corp. v. Diversified Management Group, Inc., 930 F.2d 228, 230 (2d Cir. 1991). This fundamental understanding is rooted in notions of common sense and fairness. TVT Records v. Island Def Jam Music Group, 244 F. Supp. 2d 263, 278 (S.D.N.Y. 2003).

[44] Bear, Stearns Funding, Inc. v. Interface Group-Nevada, Inc., 361 F. Supp. 2d 283, 298 (S.D.N.Y. 2005).

have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 746 N.Y.S.2d 131, 773 N.E.2d 496 (2002).[45] In this regard, a party's action implicates the covenant when the party acts in such a way as to impair the value of the contract for the other party such that it may be assumed that the action is inconsistent with the interest of the parties.[46] As a corollary to this principle of law, the implied covenant obligates the promisor only to allow the promisee to enjoy the expected benefits of the promised performance.[47] Beninati v. F.D.I.C., 55 F. Supp. 2d 141, 149, 42 U.C.C. Rep. Serv. 2d 623 (E.D.N.Y. 1999).[48]

The Defendant-Respondent admittedly never pursued the sale of anything whatsoever over the Internet. (R. 300 – 301). Furthermore, the Defendant-Respondent attempted to discontinue its contract[49] and introduced a fraudulent instrument to aid it in discontinuing the contract. (R. 9 & 207 – 208). In light of the foregoing, the Defendant-

---

[45] Please see also Dalton v. Educational Testing Service, 87 N.Y.2d 384, 389, 639 N.Y.S.2d 977, 979, 663 N.E.2d 289 (1995); Kirke La Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79, 87, 188 N.E. 163, 167 (1933).

[46] Bank of China v. Chan, 937 F.2d 780, 789, 15 U.C.C. Rep. Serv. 2d 162 (2d Cir. 1991); Interpublic Group of Companies, Inc. v. Fratarcangelo, Fed. Sec. L. Rep. (CCH) P 92234, 2002 WL 31682389 (S.D.N.Y. 2002).

[47] The Lower Court, however, seemed to find no problem in the Defendant-Appellant using other avenues for the sale of music through the Internet while the Plaintiff-Appellant received a forfeiture. (R. 14 – 20 & 30).

[48] Spanierman Gallery Profit Sharing Plan v. Arnold, 1997 WL 139522 (S.D.N.Y. 1997); Village On Canon v. Bankers Trust Co., 920 F. Supp. 520, 535 (S.D.N.Y. 1996).

[49] R. 166 & 230.

Appellant clearly breached its duty of good faith and fair dealing, thereby breaching the contract as a whole.[50]

3. THE HEARING THAT THE LOWER COURT SUGGESTED AS THE MEANS OF DETERMINING BREACH WAS ITSELF MISGUIDED, AS THE LOWER COURT WAS NOT ONLY DISALLOWED FROM DETERMINING ISSUES OF FACT, BUT SOUGHT TO DETERMINE THE MOTION ON INFORMATION THAT COULD ONLY BE KNOWN TO THE DEFENDANT-APPELLANT:

As stated supra in the first point of the Argument, the Lower Court erred in attempting to determine issues of fact. Furthermore, it will be argued in this section that the information that it sought could not have been produced by the Plaintiff-Appellant during the hearing, as the information sought (i.e. whether or not internet sales where ever made by Sonido, Inc.) was in the exclusive possession of the Defendant-Respondent. (R. 287 – 288).
As a rule, if a key fact in issue is within the exclusive knowledge of the moving party, the motion for summary judgment must be denied. Krupp v. Aetna Life & Cas. Co., 103 A.D.2d 252, 479 N.Y.S.2d 992 (2d Dep't 1984). Where the opposing party alleges that facts necessary to oppose the motion are in the exclusive possession of the movant[51] or that the

---

[50] New York University v. Continental Ins. Co., 87 N.Y.2d 308, 318, 639 N.Y.S.2d 283, 289, 662 N.E.2d 763, 108 Ed. Law Rep. 342 (1995); Harris v. Provident Life and Acc. Ins. Co., 310 F.3d 73, 80 (2d Cir. 2002); Fasolino Foods Co., Inc. v. Banca Nazionale del Lavoro, 961 F.2d 1052, 1056, 17 U.C.C. Rep. Serv. 2d 561 (2d Cir. 1992).

[51] Kraeling v. Leading Edge Elec., 2 A.D.3d 789, 770 N.Y.S.2d 382 (2d Dep't 2003); Aetna Cas. & Sur. Co. v. First Nat. City Bank, 53 A.D.2d 535, 384 N.Y.S.2d 188 (1st Dep't 1976).

opposing party has not had sufficient time to obtain disclosure of these facts, a court generally denies the motion.[52] In more specific terms, where a key fact in issue is in the exclusive knowledge of the movant, a court will either deny the motion, without prejudice, or refrain from ruling on the motion until the opposing party obtains further disclosure.[53] "[S]ummary judgment is not justified where there are likely to be issues that depend upon knowledge in the possession of the moving party for judgment, which might well be disclosed by cross-examination or examination before trial."[54]

Taking this principle into account, even ignorance of a fact will be considered a sufficient response, when it is shown that the ignorance is unavoidable. Overseas Reliance Tours & Travel Serv., Inc. v. Sarne Co., 17 A.D.2d 578, 237 N.Y.S.2d 416 (1st Dep't 1963). In the present case, the Plaintiff-Appellant was asked questions that he could not have possibly known the answer to, and even the Court acknowledged that a possibility existed for the Defendant-Appellant to be liable when it stated that a possibility existed that it may not be liable. (R. 18).

As mentioned, the Lower Court made the scrutiny of the Plaintiff-Appellant's evidence as to whether the Defendant-Respondent had made any sales the center of the hearing. (R. 10). Despite the fact that the Plaintiff-Appellant produced evidence of Sonido

---

[52] Bank of New York v. Hyland, 130 A.D.2d 942, 516 N.Y.S.2d 140 (4th Dep't 1987).

[53] Mournet v. Educational and Cultural Trust Fund of Electrical Industry, 303 A.D.2d 474, 756 N.Y.S.2d 433 (2d Dep't 2003); Classic Moments Co. v. Akata, 176 A.D.2d 567, 574 N.Y.S.2d 740 (1st Dep't 1991).

[54] Terranova v. Emil, 20 N.Y.2d 493, 497, 285 N.Y.S.2d 51, 54, 231 N.E.2d 753, 755 (1967); Baldasano v. Bank of New York, 199 A.D.2d 184, 185, 605 N.Y.S.2d 293 (1st Dep't 1993).

having sold its music through the Internet,[55] and even after the Defendant-Respondent had stated on the stand that it might have sold music over the Internet,[56] the Lower Court actively directed the questioning of the Plaintiff-Appellant toward a line of questioning, that if answered honestly, could not possibly determine the issue before the Court, as it was not the Plaintiff-Appellant who had knowledge of that issue, but the Defendant-Respondent. (R. 15 – 18). Although it is the movant who must submit evidence that completely removes any issue of fact,[57] the Defendant-Appellant only produced affidavits,[58] which were met by the affidavit of the Plaintiff-Appellant. And though it was the movant's burden to establish its case,[59] the Court sought to extract absolute certainty from the non-moving party in a situation where an issue of material fact had been raised and even the movant required a look at its records. (R. 29 – 30).

Given the law referenced in the body of the above-stated point of the Argument, the line of questioning directed by the Lower Court, which persisted in the presence of material issues of fact being raised, was clear error.

POINT THREE:

---

[55] R. 290.

[56] Maggie Burbano was equivocal as to whether Sonido, Inc. had received money from the Internet sale of music, and stated that she would have to check her records to know for certain. (R. 29 – 30).

[57] Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 317–318, 476 N.E.2d 642, 643 (1985); Morejon v. Rais Const. Co., 7 N.Y.3d 203, 818 N.Y.S.2d 792, 851 N.E.2d 1143 (2006).

[58] R. 12.

[59] Id.

AN ISSUE OF MATERIAL FACT WAS RAISED AS TO AMBIGUITY IN THE CONTRACT, MAKING SUMMARY JUDGMENT INAPPROPRIATE

Despite seeking to limit the scope of the hearing to only one issue,[60] and despite conflicting interpretations of the contract being raised in both the answering and supporting papers on the motion,[61] the Lower Court produced an interpretation of the contract that seemed to direct its determination of the scope of the hearing. (R. 11 & 30). In the section of the argument that follows it will be argued that this was error.

---

[60] R. 10.

[61] R. 295. It should be noted that this statement by Stuart A. Jackson, Esq. is not acceptable evidence on a summary judgment motion (as it is an unsworn statement made by someone with no personal knowledge), and although it makes reference to the circumstances under which the contract was made, it cannot provide evidence. South Bay Center, Inc. v. Butler, Herrick & Marshall, 43 Misc.2d 269, 250 N.Y.S.2d 863 (Sup.Ct., Nassau County, 1964). Affidavits on any motion should be made only by those with knowledge of the facts, and nowhere is this rule more faithfully applied than on the motion for summary judgment, as the attorney's affidavit, unless the attorney happens to have first-hand knowledge of the facts—which is the exception rather than the rule—has no probative force. Id. Affidavit and sworn testimony evidence, however, was provided by Mark Hynes concerning the circumstances under which the contract arose. (R. 200 – 204, 206 & 286). Furthermore, Mr. Jackson's is incorrect in stating that the interpretation presented by the Plaintiff-Appellant is new as the Plaintiff-Appellant's Verified Complaint included a definition of "Internet Sales" that included licensing agreements. (R. 296 & 37). The Defendant-Respondent also fails to provide evidence of usage of trade in its papers supporting the Motion. It is only the Plaintiff-Appellant who provides evidence of usage of trade by providing the exhibits annexed to Mark Hynes' Affidavit serving as examples of what the trade refers to as "Internet sales." (R. 287 & 290 – 292).

As mentioned in the first point of the Argument, if there is conflicting extrinsic evidence regarding the parties' intent (which presents a disputed issue of fact), a trial is required to determine that intent because a court, at the summary judgment stage, should only identify issues, and not resolve them.[62] Regarding the issue of ambiguity in particular, although the meaning of a contract is usually a question of law,[63] when there is an issue of fact regarding whether a term or clause in said contract is ambiguous, or regarding whether a determination of parties' intent depends upon the credibility of extrinsic evidence, or if a choice can be made among competing inferences to be drawn from extrinsic evidence, then such must be decided by a trier of fact.[64] Indeed, the rule changes when a contract is

---

[62] James v. Jamie Towers Housing Co., Inc., 294 A.D.2d 268, 275, 727 N.Y.S.2d 85, 92 (1st Dep't 2002); Burger King Corp. v. Horn & Hardart Co., 893 F.2d 525, 527 (2d Cir. 1990).

[63] Mallad Const. Corp. v. County Fed. Sav. & Loan Ass'n, 32 N.Y.2d 285, 291, 344 N.Y.S.2d 925, 930, 298 N.E.2d 96, 99 (1973); Long Island R. Co. v. Northville Industries Corp., 41 N.Y.2d 455, 461, 393 N.Y.S.2d 925, 929, 362 N.E.2d 558, 561 (1977).

[64] State v. R.J. Reynolds Tobacco Co., 304 A.D.2d 379, 761 N.Y.S.2d 596 (1st Dep't 2003); Amusement Business Underwriters, a Div. of Bingham & Bingham, Inc. v. American International Group, Inc., et al., 66 N.Y.2d 878, 880, 489 N.E.2d 729 (1985); Ehrlich v. Abrams Instrument Corp., 385 N.Y.S.2d 299, (1st Dep't 1976); Briarwood Towers 85th Co. v. Guterman, 523 N.Y.S.2d 98 (1st Dep't 1988); Time Warner Entertainment Co., L.P. v. Brustowsky, 634 N.Y.S.2d 82 (1st Dep't 1995); Steckler v. Steckler, 433 N.Y.S.2d 127 (1st Dep't 1980); Tri-State Pipe Lines Corp. v. Sinclair Refining Co., 264 N.Y.S.2d 138 (1st Dep't 1965). It should also be noted that if a key fact turns on an item of evidence whose admissibility at the trial is arguable, summary judgment must also be denied. Gallo Painting, Inc. v. Aetna Insurance Co., 49 A.D.2d 746, 372 N.Y.S.2d 699 (2d Dep't 1975).

deemed ambiguous, and extrinsic evidence is not only admissible, but resolution of the ambiguity itself becomes a fact issue which precludes summary judgment.[65]

In determining ambiguity, a contractual term is ambiguous where it may be ascribed two conflicting interpretations.[66] Another way of stating this rule is to say that the language of a contract is ambiguous if it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement.[67] Furthermore, the reasonably intelligent person in question is considered to be cognizant of the customs, practices, usages, and terminologies as generally understood in the particular trade or business to which the contract pertains.[68]

In circumstances where two different meanings arise in the language of the contract, due to subsequent events, and when those different meanings could apply equally to two different things

---

[65] Please see generally, Pellot v. Pellot, 305 A.D.2d 478, 481, 759 N.Y.S.2d 494, 497 (2d Dep't 2003).

[66] Greenfield v. Philles Records, Inc., 98 N.Y.2d 562, 570, 750 N.Y.S.2d 565, 570, 780 N.E.2d 166 (2002); Teichman by Teichman v. Community Hosp. of Western Suffolk, 87 N.Y.2d 514, 520, 640 N.Y.S.2d 472, 474, 663 N.E.2d 628, 20 Employee Benefits Cas. (BNA) 1532 (1996).

[67] Lucente v. International Business Machines Corp., 310 F.3d 243, 257, 29 Employee Benefits Cas. (BNA) 2414 (2d Cir. 2002); Collins v. Harrison-Bode, 303 F.3d 429, 433 (2d Cir. 2002); Golden Pacific Bancorp v. F.D.I.C., 273 F.3d 509, 516 (2d Cir. 2001).

[68] E.R. Squibb & Sons, Inc. v. Lloyd's & Companies, 241 F.3d 154, 174, 48 Fed. R. Serv. 3d 1249 (2d Cir. 2001); Alexander & Alexander Services, Inc. v. These Certain Underwriters at Lloyd's, London, England, 136 F.3d 82, 86 (2d Cir. 1998); Palmieri v. Allstate Ins. Co., 445 F.3d 179, 191 (2d Cir. 2006).

or subject matters, then a latent ambiguity is said to exist in the contract, and extrinsic evidence is admissible to show what the parties intended.[69]

The issue of latent ambiguity is illustrated by a case where a consultant entered into a contract with a corporation in which the consultant's compensation depended upon the profitability of the corporation and its parent and subsidiaries on a consolidated basis. Lazar v. Nico Industries, Inc., 164 A.D.2d 788, 559 N.Y.S.2d 326 (1st Dep't 1990). During the term of the contract, the corporation was acquired. The acquired entity, consolidated on a stand alone basis, was profitable; the acquirer, as a consolidated entity, was not. When the consultant was not paid, it sued for its compensation. The Court ruled that the consultant's claim could not be decided on summary judgment because the contract had a latent ambiguity. Lazar v. Nico Industries, Inc., 164 A.D.2d 788, 559 N.Y.S.2d 326 (1st Dep't 1990). Because of subsequent events that the parties might not have considered at the time of contracting, it was unclear whether the parties intended the consultant's compensation to be dependent upon the profitability on a consolidated basis of the entity with which the consultant contracted or the entity that contract party became part of as the result of the subsequent merger. Lazar v. Nico Industries, Inc., 164 A.D.2d 788, 559 N.Y.S.2d 326 (1st Dep't 1990).

The responsibility of a court in this matter is clear; in determining whether contractual language

---

[69] Leather Form S.R.L. v. Knoll, Inc., 2006 WL 3147487, * 2 n.1 (2d Cir. 2006); Petrie v. Trustees of Hamilton College, 158 N.Y. 458, 464, 53 N.E. 216 (1899). Additionally, the parole evidence rule is usually inapplicable in cases of ambiguity so long as the evidence presented is not in conflict with the express terms of the contract. Stage Club Corp. v. West Realty Co., 212 A.D.2d 458, 459, 622 N.Y.S.2d 948, 950-951 (1st Dep't 1995)

is ambiguous, a court should examine the entire contract and the circumstances under which it was executed as well as the relation of the parties.[70] Form should not prevail over substance and a sensible meaning of the language should be sought.[71] The particular words in the contract should not be considered in isolation from the context of the agreement but must be viewed in light of the obligation as a whole and the intention of the parties.[72] Similarly, the parties' intent may not usually be discerned by merely culling distinct provisions out of an entire agreement for the sounder approach is to consider the entirety of the agreement in the context of the parties' relationship and circumstances. Matter of Riconda, 90 N.Y.2d 733, 738, 665 N.Y.S.2d 392, 396, 688 N.E.2d 248 (1997). Furthermore, the contract should be examined in light of the circumstances that existed as of the date of its execution, not the date of its alleged breach.[73] The goal is to give the instrument a practical interpretation that will satisfy the parties' reasonable expectations at the time of contracting.[74]

In this regard, any form of evidence, documentary or otherwise, may be considered on a motion for

---

[70] Kass v. Kass, 91 N.Y.2d 554, 566, 673 N.Y.S.2d 350, 356–57, 696 N.E.2d 174 (1998); RJE Corp. v. Northville Industries Corp., 329 F.3d 310, 314 (2d Cir. 2003).

[71] Kass v. Kass, 91 N.Y.2d 554, 566, 673 N.Y.S.2d 350, 356–57, 696 N.E.2d 174 (1998).

[72] Kass v. Kass, 91 N.Y.2d 554, 566, 673 N.Y.S.2d 350, 356, 696 N.E.2d 174 (1998) (citing William C. Atwater & Co. v. Panama R. Co., 246 N.Y. 519, 524, 159 N.E. 418, 419 (1927)).

[73] X.L.O. Concrete Corp. v. John T. Brady and Co., 104 A.D.2d 181, 184, 482 N.Y.S.2d 476, 479, 21 Ed. Law Rep. 1327 (1st Dep't 1984), order aff'd, 66 N.Y.2d 970, 498 N.Y.S.2d 799, 489 N.E.2d 768, 30 Ed. Law Rep. 820 (1985).

[74] Gonzalez v. Norrito, 256 A.D.2d 440, 682 N.Y.S.2d 100 (2d Dep't 1998).

summary judgment.[75] Affidavits are a primary source of proof, however, and depositions and written admissions are also specifically mentioned.[76]

Because two separate interpretations concerning the meaning of "Internet" were brought before the Lower Court in the both the papers in support of the motion, as well as those in opposition to the motion, the issue of ambiguity was raised before the Lower Court on the motion for summary judgment,[77] and should consequently not been decided by the Court. James v. Jamie Towers Housing Co., Inc., 294 A.D.2d 268, 275, 727 N.Y.S.2d 85, 92 (1st Dep't 2002); Burger King Corp. v. Horn & Hardart Co., 893 F.2d 525, 527 (2d Cir. 1990).

Reading the affidavits and memorandums of the Defendant-Respondent, it is pointed out that Mark Hynes has an interpretation of the contract that the Defendant-Respondent disagrees with. (R. 295 – 297). The Defendant-Respondent then proceeds to call the credibility of the Plaintiff-Appellant's interpretation into question into question, referring to the circumstances surrounding the formation of the contract, and the "plain meaning"[78] of the contract. (R. 295 – 297).

---

[75] Wilkinson v. Skinner, 34 N.Y.2d 53, 356 N.Y.S.2d 15, 312 N.E.2d 158 (1974).

[76] CPLR 3212(b).

[77] R. 286 – 288 & 295 – 297.

[78] It is interesting to note that although Stuart A. Jackson, Esq., in the section of the record cited, claims to support a "plain meaning" interpretation of the contract that limits the sales to which the Plaintiff-Appellant would have a share to sales made directly over a website. (R. 296 -297). Nowhere, in the contract, however, does the term "website" ever appear. (R. 74). One major difficulty for the Defendant-Appellant's position, which can be taken from the inferences that arise from the facts of the case, is that there was not a single website being developed, but many. (R. 51, 53, 61, 63, 300 & 319 – 321).

As stated in the body of the above-stated section of the Argument, the conflicting assertions raised by both parties call up an issue of material fact, and it was thereby improper for the Lower Court to grant summary judgment.

POINT FOUR:
THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE A REVIEW OF THE RECORD, AS WELL AS THE MOVING PAPERS, REVEALED CLEAR BREACH OF CONTRACT BY THE DEFENDANT

Related to the issue of whether or not an absence of sales is determinative (Point Number Two in the Argument), and sharing relatively the same evidence in its support from the record, is the issue of whether the record reveals that Sonido, Inc. breached its contract with Mark Hynes by repudiation.

To understand, however, whether the Lower Court committed error in granting summary judgment despite the presence of repudiation in the record,[79] an analysis should be made of both principles of law (the principle of searching the record and the principle of repudiation) under New York precedent.

1. SEARCHING THE RECORD:

Because a motion for summary judgment "searches the record" under CPLR 3212(b), a court is enabled to grant judgment in favor of the party moved against even in the absence of a cross-motion by that party.[80] There is some indication, that even though the language of CPLR 3212 is permissive,

---

[79] R. 166, 207 – 208, 227 & 230.
[80] CPLR 3212(b).

that a searching of the record on a summary judgment motion may be mandatory. Wilkinson v. Skinner, 34 N.Y.2d 53, 356 N.Y.S.2d 15, 312 N.E.2d 158 (1974).[81] Thus, on a motion for summary judgment, the motion court's function is to "go behind [the pleadings] to the very substance of the action and distinguish matters of law from matters of fact, material issues from immaterial ones."[82] In this way, courts will determine motions for summary judgment by examining the "facts appearing in the record without regard to technical defects or deficiencies in [the] pleadings."[83] Summary judgment essentially requires a court to determine whether the movant's papers justify finding, as a matter of law, "that there is no defense to the cause of action or that the cause of action or defense has no merit."[84]

2. REPUDIATION:

A repudiation (also referred to as an anticipatory breach) occurs where one party to a contract repudiates its contractual obligations prior to the time designated for performance and before it has

---

[81] It has even been known to take place on appeal. Wiseman v. Knaus, 24 A.D.2d 869, 264 N.Y.S.2d 331 (2d Dep't 1965).

[82] Wanger v. Zeh, 45 Misc. 2d 93, 94, 256 N.Y.S.2d 227, 229–30 (Sup 1965), aff'd, 26 A.D.2d 729, 1966 WL 9374 (3d Dep't 1966); S. J. Capelin Associates, Inc. v. Globe Mfg. Corp., 34 N.Y.2d 338, 343, 357 N.Y.S.2d 478, 482, 313 N.E.2d 776, 778 (1974); Borchardt v. New York Life Ins. Co., 102 A.D.2d 465, 477 N.Y.S.2d 167 (1st Dep't 1984), order aff'd, 63 N.Y.2d 1000, 483 N.Y.S.2d 1012, 473 N.E.2d 262 (1984).

[83] Auto Body Federation of Empire State, Inc. v. Lewis, 80 A.D.2d 593, 436 N.Y.S.2d 32, 33 (2d Dep't 1981); Irving Finance Corp. v. Wegener, 30 A.D.2d 958, 959, 294 N.Y.S.2d 463, 465 (1st Dep't 1968).

[84] CPLR 3212(b).

received all the consideration due to it under the contract.[85] The repudiation must rise to the level of a clear and unqualified refusal to perform the entire contract.[86] In such circumstances, the non-repudiating party may assert a claim for total breach.[87]

The reason for this is that a party may not both affirm a contract by accepting its benefits while disaffirming it by repudiating it.[88] Thus, when a promisor manifests its intent not to perform its contractual obligations, the other party can treat the repudiation as an anticipatory breach of the contract.[89] This doctrine reflects the policy that when a party has communicated an unequivocal intent not to perform its contractual obligations, it does not benefit the injured party to require that it wait until actual breach occurs before commencing a lawsuit.[90] As the Court of Appeals has noted, a party

---

[85] Long Island R. Co. v. Northville Industries Corp., 41 N.Y.2d 455, 463, 393 N.Y.S.2d 925, 930, 362 N.E.2d 558 (1977); Wester v. Casein Co. of America, 206 N.Y. 506, 513–14, 100 N.E. 488, 490 (1912); Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp., 92 N.Y.2d 458, 463, 682 N.Y.S.2d 664, 667, 705 N.E.2d 656, 37 U.C.C. Rep. Serv. 2d 323 (1998).

[86] De Lorenzo v. Bac Agency Inc., 256 A.D.2d 906, 908, 681 N.Y.S.2d 846, 848 (3d Dep't 1998); Palazzetti Import/Export, Inc. v. Morson, 2001 WL 1568317 (S.D.N.Y. 2001), judgment aff'd, 54 Fed. Appx. 698 (2d Cir. 2002).

[87] Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp., 92 N.Y.2d 458, 462–63, 682 N.Y.S.2d 664, 667, 705 N.E.2d 656, 37 U.C.C. Rep. Serv. 2d 323 (1998).

[88] Sofi Classic S.A. de C.V. v. Hurowitz, 444 F. Supp. 2d 231 (S.D.N.Y. 2006).

[89] Silver Air v. Aeronautic Development Corp. Ltd., 656 F. Supp. 170, 178 (S.D.N.Y. 1987); Net2Globe Intern., Inc. v. Time Warner Telecom of New York, 273 F. Supp. 2d 436, 456 (S.D.N.Y. 2003).

[90] Rachmani Corp. v. 9 East 96th Street Apartment Corp., 211 A.D.2d 262, 266, 629 N.Y.S.2d 382, 385 (1st Dep't 1995).

who renounces a contract cannot complain if he or she is immediately sued for compensation in damages by the other party.[91] As a consequence of this reasoning, if a party has entirely repudiated its obligations under an agreement, it may not, in the usual situation, rely upon the failure of the other party to comply with a provision in the repudiated contract that it provide notice of contemplated legal action.[92] Thus, the declaration by one party that material obligations imposed by a contract will not be performed relieves the other party of any duty to perform its obligations under the contract.[93] In effect, an anticipatory breach by one party is the discharge of the other party from its obligations under the agreement.[94] In addition, when it becomes clear that one party will not live up to the terms of the contract, the aggrieved party is relieved from the performance of future acts or conditions precedent.[95] The non-repudiating party is at liberty to consider itself absolved from any future performance and it does not have to waste resources in preparing to perform.[96] There is authority that once a

---

[91] Ga Nun v. Palmer, 202 N.Y. 483, 490, 96 N.E. 99, 100 (1911) (citing Hochster v. De La Tour, 2 E&B 678, 118 Eng. Rep. 922 (Queen's Bench 1853)); Rachmani Corp. v. 9 East 96th Street Apartment Corp., 211 A.D.2d 262, 266, 629 N.Y.S.2d 382, 385 (1st Dep't 1995).

[92] Utility Garage Corp. v. National Biscuit Co., 71 A.D.2d 578, 418 N.Y.S.2d 87 (1st Dep't 1979).

[93] Stadtmauer v. Brel Associates IV, L.P., 270 A.D.2d 59, 704 N.Y.S.2d 237 (1st Dep't 2000).

[94] Computer Possibilities Unlimited, Inc. v. Mobil Oil Corp., 301 A.D.2d 70, 78, 747 N.Y.S.2d 468, 475 (1st Dep't 2002).

[95] Sunshine Steak, Salad & Seafood, Inc. v. W.I.M. Realty, Inc., 135 A.D.2d 891, 522 N.Y.S.2d 292 (3d Dep't 1987).

[96] Ga Nun v. Palmer, 202 N.Y. 483, 490, 96 N.E. 99, 102 (1911); accord Heart Const. Corp. v. Gower, 6 Misc. 3d 1018(A), 800 N.Y.S.2d 347 (Dist. Ct. 2004); American List Corp. v. U.S. News

repudiation occurs, nothing the non-repudiating party does can constitute a breach of contract even if the contract technically remained in effect after the repudiation.[97] Thus, when a party anticipatorily breaches an executory contract, the non-breaching party may either sue immediately or wait until the time set for performance.[98]

Because the doctrine of anticipatory breach evolved as a defense to performance by the non-repudiating party,[99] the doctrine generally has been limited to bilateral contracts embodying some mutual and interdependent obligations or some interdependency of performance.[100] In other words, it applies to contracts that contemplate some future performance by the non-breaching party.[101]

---

and World Report, Inc., 75 N.Y.2d 38, 44, 550 N.Y.S.2d 590, 594, 549 N.E.2d 1161 (1989).

[97] Computer Possibilities Unlimited, Inc. v. Mobil Oil Corp., 301 A.D.2d 70, 79, 747 N.Y.S.2d 468, 476 (1st Dep't 2002). As a corollary to this principle of law, a party that has repudiated the contract may not thereafter maintain an action to compel specific performance by the other party to the contract. Stadtmauer v. Brel Associates IV, L.P., 270 A.D.2d 59, 704 N.Y.S.2d 237 (1st Dep't 2000); Net2Globe Intern., Inc. v. Time Warner Telecom of New York, 273 F. Supp. 2d 436, 457 (S.D.N.Y. 2003).

[98] Rachmani Corp. v. 9 East 96th Street Apartment Corp., 211 A.D.2d 262, 266, 629 N.Y.S.2d 382, 385 (1st Dep't 1995).

[99] Long Island R. Co. v. Northville Industries Corp., 41 N.Y.2d 455, 463–66, 393 N.Y.S.2d 925, 930–32, 362 N.E.2d 558 (1977); Sequa Corp. v. Gelman, 1996 WL 79876 (S.D.N.Y. 1996).

[100] Long Island R. Co. v. Northville Industries Corp., 41 N.Y.2d 455, 463–66, 393 N.Y.S.2d 925, 930–32, 362 N.E.2d 558 (1977); Acacia Nat. Life Ins. Co. v. Kay Jewelers, Inc., 203 A.D.2d 40, 43, 610 N.Y.S.2d 209, 212 (1st Dep't 1994).

[101] American List Corp. v. U.S. News & World Report, Inc., 75 N.Y.S.2d 38, 44, 550 N.Y.S.2d 590, 594 (1989); Gardiner Intern., Inc. v. J.W. Townsend & Associates, Inc., 13 A.D.3d 246, 788 N.Y.S.2d 312 (1st Dep't 2004).

Simply stated, a repudiation is essentially a unilateral termination of the agreement. If the contract allows such a termination, the repudiation ends the contract and the parties' contractual relations.[102] If the contract does not provide the repudiating party a right to terminate it unilaterally, repudiation breaches the contract.[103] A party to a contract that does not have a right of termination may not unilaterally terminate the contract by repudiating it and thereby relieve itself of its contractual obligation to perform.[104] In addition, termination of an agreement without affording the other party its contractual right to cure is also a repudiation of the agreement and relieves the breaching party of any obligation to effectuate a cure.[105] However, where one party breaches its contractual obligations, a statement by the other party that it will not perform unless the breach is cured does not constitute a repudiation.[106]

The test for whether a repudiation has occurred is an objective one and a party's good faith is

---

[102] Rochdale Village, Inc. v. Public Service Emp. Union, Local No. 80, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 605 F.2d 1290, 1297, 102 L.R.R.M. (BNA) 2476, 87 Lab. Cas. (CCH) P 11591 (2d Cir. 1979).

[103] Lopresti v. Merson, 168 L.R.R.M. (BNA) 2427, 145 Lab. Cas. (CCH) P 11188, R.I.C.O. Bus. Disp. Guide (CCH) P 10168, 2001 WL 1132051 (S.D.N.Y. 2001).

[104] Energy Capital Co. v. Caribbean Trading and Fidelity Corp., 1996 WL 157498 (S.D.N.Y. 1996).

[105] MK West Street Co. v. Meridien Hotels, Inc., 184 A.D.2d 312, 584 N.Y.S.2d 310 (1st Dep't 1992).

[106] Scavenger, Inc. v. GT Interactive Software Corp., 289 A.D.2d 58, 734 N.Y.S.2d 141 (1st Dep't 2001).

immaterial.[107] Thus, anticipatory breach cannot occur unless it is clear that a party will not honor its obligations,[108] and it is the words and acts of the repudiating party that are communicated to the other party are controlling, regardless of what the repudiating party may have intended.[109] Furthermore, whether repudiation has occurred generally presents a fact issue of whether there has been a clear and unequivocal expression of an intention not to perform.[110]

In the present case, the Defendant-Respondent, aside from not endeavoring in any way to perform its

---

[107] Record Club of America, Inc. v. United Artists Records, Inc., 643 F. Supp. 925, 939, 2 U.C.C. Rep. Serv. 2d 1310 (S.D.N.Y. 1986), vacated, 890 F.2d 1264 (2d Cir. 1989).

[108] Rachmani Corp. v. 9 East 96th Street Apartment Corp., 211 A.D.2d 262, 266, 629 N.Y.S.2d 382, 385 (1st Dep't 1995); Salvato v. St. David's School, 307 A.D.2d 812, 763 N.Y.S.2d 42 (1st Dep't 2003); Roan/Meyers Associates, L.P. v. CT Holdings, Inc., 26 A.D.3d 295, 810 N.Y.S.2d 67 (1st Dep't 2006).

[109] Forward Publications v. International Pictures, 277 A.D. 846, 98 N.Y.S.2d 139 (1st Dep't 1950). The announcement of an intention not to perform must be positive and unequivocal. Tenavision, Inc. v. Neuman, 45 N.Y.2d 145, 150, 408 N.Y.S.2d 36, 38, 379 N.E.2d 1166, 24 U.C.C. Rep. Serv. 337 (1978). If words are used, the words must be unequivocal and must draw a "discernible line in the sand." Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp., 92 N.Y.2d 458, 463, 682 N.Y.S.2d 664, 667, 705 N.E.2d 656, 37 U.C.C. Rep. Serv. 2d 323 (1998). It has been held that the repudiation can be either a statement by a party indicating that it will commit a breach that will give the other party the ability to assert a claim for total damages, or an action by a party which renders it unable to perform its contractual obligations. Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp., 92 N.Y.2d 458, 463, 682 N.Y.S.2d 664, 667, 705 N.E.2d 656, 37 U.C.C. Rep. Serv. 2d 323 (1998).

[110] O'Connor v. Sleasman, 14 A.D.3d 986, 788 N.Y.S.2d 518 (3d Dep't 2005).

half of the bargain,[111] shut Mark Hynes out of the building where he was endeavoring to perform on his portion of the contract (telling him not to come back),[112] and presented Mark Hynes with a forged document in an attempt to avoid its contractual obligations.[113] These measures reasonably raise evidence of repudiation, and thereby raise an issue of material fact for the fact-finder. O'Connor v. Sleasman, 14 A.D.3d 986, 788 N.Y.S.2d 518 (3d Dep't 2005).

POINT FIVE:

ASSUMING THAT AN ISSUE OF FACT HAD NOT BEEN RAISED ON THE MOTION, THE LOWER COURT'S INTERPRETATION WOULD STILL HAVE BEEN IN ERROR REGARDING THE LAW, AS IT RAN CONTRARY TO BOTH FIRST DEPARTMENT AND COURT OF APPEALS PRECEDENT REGARDING THE INTERPRETATION OF CONTRACTS

Although absent any relevant extrinsic evidence of the parties' intent, or anticipation of the availability thereof, a court can resolve any ambiguity in the written contract as a matter of law,[114] a court is required to apply the law in deciding a matter as a matter of law.

In the case at bar, a number of principles of law that apply to the interpretation of contracts were not followed by the Lower Court. These will be examined in this final section of the Argument, and will be contrasted with the approach taken by the Lower Court.

---

[111] R. 300 – 301.

[112] R. 166 & 230.

[113] R. 9 & 207 – 208.

[114] Schuler-Haas Elec. Co. v. Aetna Cas. & Sur. Co., 40 N.Y.2d 883, 885, 389 N.Y.S.2d 348, 348, 357 N.E.2d 1003 (1976).

1. THE CONTRACT MUST ALWAYS BE INTERPRETED IN THE LIGHT OF THE PURPOSE FOR WHICH IT WAS CREATED:

A contract should be construed in light of the objective the parties were trying to accomplish.[115] The manifest purpose the parties sought to accomplish is of paramount significance.[116] It takes precedence over all other canons of construction.[117] A contract should not be read in a manner that defeats its purpose.[118] Likewise, the function of a court is to effect that purpose.[119] In interpreting contract language, besides considering the common meaning of the language employed, a court must consider the parties' expectations and purposes in view of the factual context in which they made the agreement, with due regard to their sophistication.[120] Thus, a written contract will be interpreted to give effect to its general purpose.

---

[115] Moncure v. New York State Dept. of Environmental Conservation, 218 A.D.2d 262, 266, 639 N.Y.S.2d 859, 862 (3d Dep't 1996).

[116] Teig v. Suffolk Oral Surgery Associates, 2 A.D.3d 836, 769 N.Y.S.2d 599 (2d Dep't 2003).

[117] In re Herzog, 301 N.Y. 127, 135, 93 N.E.2d 336, 339 (1950); Massachusetts Mut. Life Ins. Co. v. Thorpe, 260 A.D.2d 706, 687 N.Y.S.2d 490 (3d Dep't 1999).

[118] Lee v. Marvel Enters., Inc., 386 F. Supp. 235, 244 (S.D.N.Y. 2005) (quoting Allen v. WestPoint-Pepperell, Inc., 1996 WL 2004 (S.D.N.Y. 1996)).

[119] Marvel Entertainment Group, Inc. v. Young Astronaut Council, 747 F. Supp. 945, 948 (S.D.N.Y. 1990); Wong v. New York Times Co., 297 A.D.2d 544, 547, 747 N.Y.S.2d 213, 217 (1st Dep't 2002).

[120] Madison Ave. Leasehold, LLC v. Madison Bentley Associates LLC, 30 A.D.3d 1, 8, 811 N.Y.S.2d 47, 53 (1st Dep't 2006), aff'd, 8 N.Y.3d 59, 2006 WL 3716035 (2006).

Westmoreland Coal Co. v. Entech, Inc., 100 N.Y.2d 352, 358, 763 N.Y.S.2d 525, 528, 794 N.E.2d 667 (2003).

The twin focal points in interpreting the parties' contract are their objective and their purpose in entering into it.[121] The purpose to be accomplished and the object to be advanced are to be considered as part of the effort to ascertain the intent of the parties. M. O'Neil Supply Co. v. Petroleum Heat & Power Co., 280 N.Y. 50, 55, 19 N.E.2d 676, 679 (1939). The contract is thus read in light of the circumstances existing at the time of its making for such circumstances may stamp a meaning upon a word or phrase that is different from the strict or primary meaning to be gathered from the instrument unenlightened by extrinsic aids. Becker v. Peter A. Frasse & Co., 255 N.Y. 10, 14, 173 N.E. 905, 906 (1930).

Although Mark Hynes presented the only admissible evidence of the purpose and circumstances surrounding the creation of the contract (as only he could, presenting the only personal knowledge concerning the creation of the document),[122] the Lower Court ignored the only admissible evidence presented and chose an interpretation of the contract that was not supported by that evidence. (R. 11).

2. THE RULE AGAINST THE ADDITION OF TERMS:

Courts may not, by construction, add or excise terms, or distort the meaning of those used, thereby making

---

[121] New York Bank for Sav. v. Howard Cortlandt St., Inc., 106 A.D.2d 496, 482 N.Y.S.2d 836 (2d Dep't 1984).

[122] South Bay Center, Inc. v. Butler, Herrick & Marshall, 43 Misc.2d 269, 250 N.Y.S.2d 863 (Sup.Ct., Nassau County, 1964).

a new contract for the parties under the guise of interpreting their writing.[123] Furthermore, a court may not rewrite a contract to accord with its instincts for the dispensation of equity under the facts of a case.[124]

In the present case, the Lower Court added a term to the contract limiting Mark Hynes's share in Internet sales to sales made directly by Defendant-Appellant over the Defendant-Appellant's website. (R. 11 – 30). This was done despite the fact that the contract in question did not have the limiting terms of "directly" or "website" included anywhere in its language,[125] and the fact that the purpose of the contract itself was to provide for a system that encompassed all of Sonido, Inc.'s business (not merely that directly conducted over its website).[126]

3. THE CONTRACT WILL BE INTERPRETED AS A WHOLE, AND EACH PROVISION MUST BE GIVEN FULL MEANING:

A court must attempt to give effect to the parties' reasonable expectations by determining their purpose and intent which is ascertained by looking at the language the parties chose to use, the contract as a whole, and the conduct of the parties. Omni Berkshire Corp. v. Wells Fargo Bank, N.A., 307 F. Supp. 2d 534, 540 (S.D.N.Y. 2004). Thus, the intention of the parties to a contract must be

---

[123] Reiss v. Financial Performance Corp., 97 N.Y.2d 195, 199, 738 N.Y.S.2d 658, 764 N.E.2d 958 (2001).

[124] Terwilliger v. Terwilliger, 206 F.3d 240, 245 (2d Cir. 2000) (citing De Vanzo v. Newark Ins. Co., 44 A.D.2d 39, 353 N.Y.S.2d 29 (2d Dep't 1974), order aff'd, 37 N.Y.2d 733, 374 N.Y.S.2d 619, 337 N.E.2d 131 (1975)).

[125] R. 74.

[126] R. 200 – 204, 206 & 286.

ascertained not from one provision but from the entire instrument.[127] In this way, a contract should be construed to give full meaning and effect to all of its provisions.[128] The rules of contract construction require courts, if possible, to adopt an interpretation that gives meaning to every provision of the contract.[129]

For these reasons, a written contract will be read as a whole and every part will be interpreted with respect to the whole,[130] as the meaning of a writing may be distorted if undue force is given to a single word or phrase.[131] In effect, the document should be read as a whole to ensure that excessive emphasis is not placed upon particular words or phrases.[132] Also, when reading the contract as a whole, a court must

---

[127] Paige v. Faure, 229 N.Y. 114, 118, 127 N.E. 898, 899, 10 A.L.R. 649 (1920); Village of Hamburg v. American Ref-Fuel Co. of Niagara, L.P., 284 A.D.2d 85, 89, 727 N.Y.S.2d 843, 846 (4th Dep't 2001).

[128] American Exp. Bank Ltd. v. Uniroyal, Inc., 164 A.D.2d 275, 562 N.Y.S.2d 613 (1st Dep't 1990). God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Associates, LLP, 6 N.Y.3d 371, 812 N.Y.S.2d 435, 845 N.E.2d 1265 (2006).

[129] Muzak Corp. v. Hotel Taft Corp., 1 N.Y.2d 42, 46, 150 N.Y.S.2d 171, 174, 133 N.E.2d 688 (1956); Greater New York Mut. Ins. Co. v. Mutual Marine Office, Inc., 3 A.D.3d 44, 50, 769 N.Y.S.2d 234, 239 (1st Dep't 2003); Mionis v. Bank Julius Baer & Co., Ltd., 301 A.D.2d 104, 109, 749 N.Y.S.2d 497, 502 (1st Dep't 2002); Trump-Equitable Fifth Ave. Co. v. H.R.H. Const. Corp., 106 A.D.2d 242, 485 N.Y.S.2d 65 (1st Dep't 1985), order aff'd, 66 N.Y.2d 779, 497 N.Y.S.2d 369, 488 N.E.2d 115 (1985).

[130] Westmoreland Coal Co. v. Entech, Inc., 100 N.Y.2d 352, 357, 763 N.Y.S.2d 525, 528, 794 N.E.2d 667 (2003); Empire Properties Corporation v. Manufacturers Trust Co., 288 N.Y. 242, 248, 43 N.E.2d 25, 28 (1942).

[131] Id.

[132] South Road Associates, LLC v. Intern. Business Machines Corp., 4 N.Y.3d 272, 277, 793 N.Y.S.2d 835, 826 N.E.2d 806 (2005).

interpret it to give effect to the general purpose of the contract.[133] Thus, a court will strive to give meaning to every sentence, clause and word.[134]

The very goal of contract construction is to avoid an interpretation that would leave a clause meaningless.[135] Words are never to be construed as meaningless if they can be made effective by any reasonable construction of the contract. 67 Wall St. Co. v. Franklin Nat. Bank, 37 N.Y.2d 245, 248, 371 N.Y.S.2d 915, 918, 333 N.E.2d 184 (1975). Thus, a construction should be avoided if it ignores the interplay of the terms and renders one or more of the terms inoperable.[136]

In the case at bar, the Lower Court presumably relied on an argument presented by the Defendant-Respondent in interpreting the contract,[137] as

---

[133] Postlewaite v. McGraw-Hill, Inc., 411 F.3d 63, 67, 75 U.S.P.Q.2d (BNA) 1437 (2d Cir. 2005); Rentways, Inc. v. O'Neill Milk & Cream Co., 308 N.Y. 342, 347, 126 N.E.2d 271, 273 (1955); accord Metropolitan Life Ins. Co. v. Noble Lowndes Intern., Inc., 84 N.Y.2d 430, 438, 618 N.Y.S.2d 882, 886, 643 N.E.2d 504 (1994).

[134] Travelers Cas. and Sur. Co. v. Certain Underwriters at Lloyd's of London, 96 N.Y.2d 583, 594, 734 N.Y.S.2d 531, 538, 760 N.E.2d 319, 32 Envtl. L. Rep. 20262 (2001).

[135] Two Guys from Harrison-N.Y., Inc. v. S.F.R. Realty Associates, 63 N.Y.2d 396, 482 N.Y.S.2d 465, 472 N.E.2d 315 (1984); Alexander & Alexander Services, Inc. v. These Certain Underwriters at Lloyd's, London, England, 136 F.3d 82, 86 (2d Cir. 1998); Eastman Kodak Co. v. STWB Inc., 232 F. Supp. 2d 74, 92 (S.D.N.Y. 2002) (quoting Restatement (Second) of Contracts § 203(a) ("'an interpretation which gives a reasonable ... and effective meaning to all the terms is preferred to an interpretation which leaves a part ... of no effect.'").

[136] Pearce, Urstadt, Mayer & Greer Realty Corp. v. Atrium Development Associates, 77 N.Y.2d 490, 568 N.Y.S.2d 890, 571 N.E.2d 60 (1991); Ruttenberg v. Davidge Data Systems Corp., 215 A.D.2d 191, 196, 626 N.Y.S.2d 174, 177 (1st Dep't 1995).

[137] R. 297.

pertaining only to direct sales over the Internet, as no terms limiting the contract to sales made directly over the internet are found in the language of the contract. (R. 74). In short, the interpretation suggested by the Defendant-Respondent is that the contract only applies to direct sales made over a website as it refers to "sales made and paid for via the internet." (R. 74). In this interpretation, the Defendant-Respondent interprets the word "and" in a restrictive sense, as a term limiting the contract to subject matter only the set of products that are both "bought" and "paid for" via the internet. (R. 74). Not only does this interpretation ignore the interplay of words, and "advertising" is not the kind of thing that is both "bought" and "paid for" over one's own website,[138] but it ignores Court of Appeals precedent where the word "and" is judicially determined to be interpreted in a non-limiting way.[139] Unless the document shows on its face that the word "and" is to be literally construed, "and" is considered to also mean "or;" such was the case where a letter of credit, providing for shipment in "August and September" covered a shipment in "August and/or September."[140]

4. THE RULE OF CONSISTENCY:

Sophisticated lawyers are presumed to know how to use parallel construction and identical wording to impart identical meaning when they intend to do so

---

[138] The Defendant-Respondent seems to ignore the fact through this interpretation that the "advertisement" in question is Sonido, Inc.'s own advertisement.

[139] Lamborn v. National Park Bank, 212 A.D. 25, 208 N.Y.S. 428, aff'd 240 N.Y. 520, 148 N.E. 664 (1925); Murphy v. Long Island Oyster Farms, Inc., 491 N.Y.S.2d 721, 722, 112 A.D.2d 276, 277 (N.Y.A.D. 2 Dept. Jul 15, 1985).

[140] Id.

and to know how to use different words and construction to establish distinctions in meaning.[141] When language is omitted from one provision but is placed in other provisions, it must be assumed that the omission was intentional.[142] Terms in a document, especially terms of art, normally have the same meaning throughout the document in the absence of a clear indication that different meanings were intended.[143] Likewise, the court may presume that the same words used in different parts of the contract are intended to have the same meaning throughout the contract.[144] In this way, in the absence of evidence indicating a contrary intention, the same meaning will be given to the similar expressions.[145]

As mentioned above in the subsection concerning the rule of giving the full meaning to every provision of the contract, an absurd result is arrived at when a meaning of direct sales over the Internet is applied to the contract.[146] If the same meaning cannot be applied throughout the contract without receiving an absurd result, then the rule of consistency cannot be followed, and the interpretation should not be followed.

---

[141] International Fidelity Insurance Company v. County of Rockland, 98 F. Supp. 2d 400, 412 (S.D.N.Y. 2000); accord National Basketball Ass'n v. National Basketball Players Ass'n, 176 L.R.R.M. (BNA) 2487, 2005 WL 22869 (S.D.N.Y. 2005).

[142] Sterling Investor Services, Inc. v. 1155 Nobo Associates, LLC, 30 A.D.3d 579, 818 N.Y.S.2d 513 (2d Dep't 2006).

[143] Maryland Cas. Co. v. W.R. Grace and Co., 128 F.3d 794, 799 (2d Cir. 1997), as amended, (Nov. 18, 1997).

[144] Finest Investments v. Security Trust Co. of Rochester, 96 A.D.2d 227, 468 N.Y.S.2d 256 (4th Dep't 1983), order aff'd, 61 N.Y.2d 897, 474 N.Y.S.2d 481, 462 N.E.2d 1199 (1984).

[145] Lashins Arcade Co. v. Jorling, 221 A.D.2d 533, 536, 634 N.Y.S.2d 138, 141 (2d Dep't 1995).

[146] Please see also, *supra*, note 132.

5. THE RULE THAT CONDITIONS WILL BE DISFAVORED:

If there is doubt as to the meaning of a contract's language, a finding that the language creates a condition is disfavored.[147] A condition must be explicitly stated in a contract.[148] In the absence of unambiguous language, a condition will not be found. Ginett v. Computer Task Group, Inc., 962 F.2d 1085, 1100, 22 Fed. R. Serv. 3d 1338 (2d Cir. 1992).

If the Lower Court viewed sales being made directly over the website of Sondio, Inc. as a condition to Mark Hynes receiving the fruits of the contract,[149] then the Court applied an interpretation

---

[147] DeVito v. Hempstead China Shop, Inc., 38 F.3d 651, 654 (2d Cir. 1994).

[148] Catskill Development, L.L.C. v. Park Place Entertainment Corp., 154 F. Supp. 2d 696, 704 (S.D.N.Y. 2001); please see also Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co., 86 N.Y.2d 685, 636 N.Y.S.2d 734, 660 N.E.2d 415 (1995).

[149] R. 30. The Lower Court interprets the contract as offering conditional payment only, as it states that Mark Hynes would be paid if the Defendant-Respondent "decided to go into the business of selling music over the internet." This interpretation is not only conditional, but would also be an illusory contract, which is an interpretation that should be disfavored. Zurakov v. Register.Com, Inc., 304 A.D.2d 176, 760 N.Y.S.2d 13 (1st Dep't 2003); Broadview Intern. LLC v. Commissioner.com, Inc., 17 A.D.3d 102, 793 N.Y.S.2d 22 (1st Dep't 2005). In addition, the Lower Court's interpretation, which resulted in granting the Defendant-Respondent's motion for summary judgment, ignores the fact that the Plaintiff-Appellant has a claim for unjust enrichment which arose from alleging that he conveyed a benefit upon the Defendant-Respondent without being adequately compensated, and by requesting "such other relief as the court deems just and proper." (R. 36 & 38). Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561, 841 N.E.2d 742, 807 N.Y.S.2d 583, 2005 N.Y. Slip Op. 08846 (2005). However, because there was a contract in place, unjust enrichment is not

of the contract that should have been disfavored and should not have been found in the language of the contract.[150]

6. THE RULE AGAINST FORFEITURE:

Courts will not interpret ambiguous provisions to effect a forfeiture.[151] The Court of Appeals has noted that the Restatement defines the term forfeiture as the denial of compensation that results when a party loses its rights to the agreed exchange after it has substantially relied, by preparation or performance, on the expectation of the exchange.[152] Forfeitures are abhorrent to the law and will not be imposed if there is any other reasonable basis to resolve the issue.[153] The rule is clear: courts will avoid an interpretation that renders a contract illusory and unenforceable. Curtis Properties Corp. v. Greif

---

the appropriate remedy, and it would deprive the Plaintiff-Appellant of the benefit of his bargain. EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11, 832 N.E.2d 26, 799 N.Y.S.2d 170, Blue Sky L. Rep. P 74,543, 2005 N.Y. Slip Op. 04478 (2005); Singer Asset Finance Co., LLC v. Melvin, 33 A.D.3d 355, 822 N.Y.S.2d 68, 2006 N.Y. Slip Op. 07198 (1st Dep't 2006). The result of the Lower Court's interpretation leaves the Plaintiff-Appellant no remedy at either law or in equity.

[150] Irving Trust Co. v. Nationwide Leisure Corp., 711 F. Supp. 166, 168 (S.D.N.Y. 1989).

[151] Kreiss v. McCown De Leeuw & Co., 131 F. Supp. 2d 428 (S.D.N.Y. 2001)(citing 220 West 42 Associates v. Ronbet Newmark Co., 84 Misc. 2d 259, 375 N.Y.S.2d 255 (Sup 1975), judgment modified, 53 A.D.2d 829, 385 N.Y.S.2d 304 (1st Dep't 1976), order aff'd, 40 N.Y.2d 1000, 391 N.Y.S.2d 107, 359 N.E.2d 701 (1976)).

[152] Oppenheimer & Co., Inc. v. Oppenheim, Appel, Dixon & Co., 86 N.Y.2d 685, 692, 636 N.Y.S.2d 734, 738, 660 N.E.2d 415 (1995).

[153] Id.

Companies, 212 A.D.2d 259, 265, 628 N.Y.S.2d 628, 632 (1st Dep't 1995).

As mentioned above in the subsection concerning the rule disfavoring conditions,[154] the Lower Court took a position that would lead to forfeiture.[155] In light of the above-stated law, such is error.

7. CONSTRUCTION IN FAVOR OF THE PROMISEE:

All else being equal, the ambiguous contract should be construed in a manner as will be more beneficial to, and as understood by, the promisee.[156]

In the case at bar, the Lower Court was presented with two conflicting interpretations of the contract by both parties. (R. 286 – 288 & 296 – 297). Nonetheless, it chose to not only favor the interpretation of the promisor,[157] but to favor it to the point of forfeiture against the promisee. (R. 30).

8. CONSTRUCTION AGAINST THE DRAFTSMAN:

The rule of construction against the draftsman provides that an agreement must be construed most strongly against the party who prepared it and favorably to the party which had no voice in its preparation.[158]

---

[154] Please see, *supra*, note 143.

[155] R. 30.

[156] M. O'Neil Supply Co. v. Petroleum Heat & Power Co., 280 N.Y. 50, 55, 19 N.E.2d 676, 678 (1939); accord Chase Manhattan Bank v. New Hampshire Ins. Co., 193 Misc. 2d 580, 586, 749 N.Y.S.2d 632, 637 (Sup 2002).

[157] R. 11.

[158] Jacobson v. Sassower, 66 N.Y.2d 991, 993, 499 N.Y.S.2d 381, 382, 489 N.E.2d 1283 (1985); 67 Wall St. Co. v. Franklin Nat. Bank, 37 N.Y.2d 245, 249, 371 N.Y.S.2d 915, 918, 333 N.E.2d

By interpreting the contract in favor of the interpretation provided by Sonido, Inc.,[159] the Lower Court interpreted the contract to the favor of the draftsman, as Jerry Masucci, an attorney, was the draftsman. (R. 240). In light of the stated rule, that interpretation should have been disfavored.

CONCLUSION

For the reasons stated, it is respectfully presented that the Court should reverse the grant of summary judgment given by the Lower Court, and that it should grant a decision in accord with the rules of law stated.

By: s/ Robert M. Shafran, Esq.
Robert M. Shafran, Esq.
LAW OFFICES OF ANATTA LEVINSKY, P.C.
6924 Bay Parkway
Brooklyn, New York 11204
(718) 837-5555

---

184 (1975); Computer Associates Intern., Inc. v. U.S. Balloon Mfg. Co., Inc., 10 A.D.3d 699, 782 N.Y.S.2d 117 (2d Dep't 2004).

[159] R. 11 & 30.

APPENDIX J

To Be Argued By:
ROBERT M. SHAFRAN

New York County Clerk's Index No. 604046/2000

NEW YORK SUPREME COURT
APPELLATE DIVISION – FIRST DEPARTMENT

MARK HYNES,
Plaintiff-Appellant,

-against-

SONIDO, INC.,
Defendant-Respondent.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

ROBERT M. SHAFRAN, ESQ.
THE LAW OFFICES OF
ANATTA LEVINSKY, P.C.
6924 Bay Parkway
Brooklyn, New York 11204
(718) 837-9700

Attorneys for Plaintiff-Appellant

REPRODUCED ON RECYCLED PAPER
***

[Reply Brief for Plaintiff-Appellant pp. 1-25]

ARGUMENT

REPLY TO FIRST POINT:
THE DEFENDANT-RESPONDENT IS INCORRECT IN STATING THAT THE LOWER COURT PROPERLY FOUND THAT THERE WERE NO ISSUES OF MATERIAL FACT

Although it is true that a party opposing a motion for summary judgment must show facts sufficient to require a trial if such party is to defeat the motion,[160] and though it is also true that the party opposing the motion must also "make his motion by producing evidentiary proof in admissible form",[161] it is important to note that these burdens do not pass to the party opposing the motion until, and only until, the moving part has established *prima facie* entitlement to judgment as a matter of law.[162]

As argued in the Plaintiff-Appellant's Brief,[163] the Defendant-Respondent did not meet its burden of

---

[160] Friends of Animals v. Associated Fur Mfrs., 46 N.Y.2d 1065, 1067, 416 N.Y.S.2d 730, 791 (1979), cited in Defendant-Respondent's Brief at P. 7.

[161] Id.

[162] Friends of Animals v. Associated Fur Mfrs., 46 N.Y.2d 1065, 1067, 416 N.Y.S.2d 730, 791 (1979), cited in Defendant-Respondent's Brief at P. 7.

[163] Please see Footnote 57 in Plaintiff-Appellant's Brief at P. 23. Please also see Point Two and Point Four of the Plaintiff-Appellant's Brief, at PP. 7-22 and PP. 28-35 respectively, which both present the argument that the issue of direct sales alone is not dispositive on the issue of breach of contract, and that,

establishing *prima facie* entitlement as a matter of law on the issue of breach of contract, as there are many scenarios in which there can be absence of sales by a defendant that still allow for breach of contract.[164]

The Defendant-Respondent, now seems to be arguing that it produced evidence in admissible form that it never made any *direct* sales over any of its websites (though the fact that such evidence referred only to *direct* sales over a website – as distinguished from Internet sales as they are commonly understood – was not made clear or manifested until the Defendant-Respondent interposed that assertion in its reply papers).[165] Such would deprive the Plaintiff-Appellant of any notice that the Defendant-Respondent took issue with – or made a distinction between – sales made *directly* by the Defendant-Appellant over its own website and sales made over the Internet as stated in the Plaintiff-Appellant's Verified Complaint.[166]

As stated in the Plaintiff-Appellant's Brief, the Plaintiff-Appellant adequately introduced evidence that met its burden on the Motion[167] — *as he* introduced evidence that Sonido had indeed made Internet sales according to the interpretation of

---

consequently, the moving party was not entitled, as a matter of law, to a judgment in its favor on the issue of breach.

[164] Please see Point Two and Point Four of the Plaintiff-Appellant's Brief at PP. 11-22 and PP. 28-35.

[165] Compare R. 305 – 328 to R. 294 – 301.

[166] Please see ¶16 of Plaintiff-Appellant's Verified Complaint where it is stated: "It was the intent of the parties that all sales of Sonido products which result from any source by the internet method would generate income for Sonido and Mark T. Hynes by the internet method." R. 37. See also O'Connor-Miele v. Barhite & Holzinger, Inc., 234 A.D.2d 106, 106, 650 N.Y.S.2d 717, 718 (1st Dep't 1996).

[167] Plaintiff-Appellant's Brief, PP. 7-34.

Internet sales advanced in the Plaintiff-Appellant's Verified Complaint.[168] In light of this, for the Defendant-Respondent to now claim that the Plaintiff-Appellant never met its burden on the Motion is entirely incorrect, and only makes sense if Defendant-Respondent now proposes to the Appellate Division that Mark Hynes had the burden of overcoming an interpretation that the Defendant-Respondent did not interpose until its reply papers on the Motion – which would then make its reply an improper sur-reply.[169]

---

[168] Please see Plaintiff-Appellant's Brief at PP. 7-11 and PP. 22-34.

[169] CPLR 2214; Voytek Technology, Inc. v. Rapid Access Consulting, Inc., 279 A.D.2d 470, 719 N.Y.S.2d 112, 2001 N.Y. Slip Op. 00236 (2d Dep't 2001); Klimis v. Lopez, 290 A.D.2d 538, 736 N.Y.S.2d 697, 2002 N.Y. Slip Op. 00601 (2d Dep't 2002); Dannasch v. Bifulco, 184 A.D.2d 415, 416-417, 585 N.Y.S.2d 360 (1st Dep't 1992).

As a note: The Plaintiff-Appellant has already argued in the Appellant Brief that it was error for the Lower Court to decide the interpretation of a contract when the issue of ambiguity was raised on the papers of the motion (Please see Plaintiff-Appellant's Brief at PP. 22-27). Such, however, is distinct from the point raised here, as to the Defendant not even meeting its burden, which ties into the arguments raised in Point Two and Point Four of the Plaintiff-Appellant's Brief at PP. 11-22 and PP. 28-35. Thus, a situation is revealed where both the Lower Court could not proceed with an interpretation of the contract separate from a determination by the fact finder of the circumstances surrounding the meaning of the contract, as the issue of ambiguity had been raised on the motion, and, furthermore, the Defendant-Respondent had not met its burden on the motion (if it sought such an issue to come before the Court on its Motion), because it did not present its evidence, and argument for entitlement as a matter of law, on the original motion papers, which prevented the Plaintiff-Appellant from being required to produce any evidence on the issue – though he did.

As mentioned, the evidence produced by the Defendant-Respondent on the original moving papers may have been in admissible form, but Defendant-Respondent never stated in those papers that such evidence referred only to direct sales made by Sonido, Inc., or that it even took issue with the interpretation presented by the Plaintiff-Appellant in his Verified Complaint until its reply papers – thus failing to raise any burden on the part of the Plaintiff-Appellant to present evidence defeating the Motion on the issue of whether or not the contract referred to direct sales over a website or to sales made by any means over the Internet.[170] This is so precisely because the Defendant-Respondent did not make it evident, in any way whatsoever, that such was meant when it claimed that it had "never sold any music or any other item over the internet,"[171] and did not make such a claim apparent until it put in its reply papers.[172] Thus, the Defendant-Respondent never satisfied its burden as a moving party because the mere fact that the evidence came before the Court on the motion was insufficient to establish *prima facie* entitlement to a judgment as a matter of law when that evidence did not come forward on the original moving papers, as the moving party must establish its entitlement within the moving papers as to every element of a claim or defense.[173]

---

[170] Costello v. Hapco Realty, Inc., 305 A.D.2d 445, 446, 761 N.Y.S.2d 79, 80 (2d Dep't 2003).

[171] Please see R. 309.

[172] Compare R. 305 – 328 to R. 294 – 301.

[173] CPLR 3212(b). See also Falk v. Goodman, 7 N.Y.2d 87, 195 N.Y.S.2d 645, 163 N.E.2d 871 (1959) and Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (a 1986 determination of the U.S. Supreme Court suggesting that the resisting party need not come forward with proof to sustain

Concerning every other issue that came up in the papers supporting and opposing the Motion, the Defendant-Respondent did not meet its burden – for other reasons than those listed above – as it did not provide the requisite admissible evidence concerning the meaning of the contract at the time of its formation,[174] and it did not provide evidence that the Plaintiff-Appellant did not suffer any damages whatsoever, which would be necessary for overcoming Plaintiff-Appellant's sworn statements that he had suffered loss due to reliance and breach (evidence which was before the Lower Court on the Motion).[175]

---

its claim until the moving party has demonstrated some basic element missing from the claim). See also Dannasch v. Bifulco, 184 A.D.2d 415, 416-417, 585 N.Y.S.2d 360 (1st Dep't 1992).

[174] Please see Footnote 57 of Plaintiff-Appellant's Brief at P. 23.

[175] In his Affidavit offered in opposition to the Defendant-Appellant's Motion for Summary Judgment, Mark Hynes presented sworn evidence of the circumstances existing at the time of the formation of the contract (¶4, R. 286); of Repudiation by the Defendant-Respondent(¶5, R. 286); a questioning of the credibility of the Affidavits offered in support of the Defendant-Respondent's Motion [¶7 - ¶9, R. 287, also see Rickert v. Travelers Ins. Co., 159 A.D.2d 758, 551 N.Y.S.2d 985 (3d Dep't 1990) in regard to issues of credibility upon the moving papers]; as to the meaning of sales made "via the internet" in affidavit form referencing industry practice and trade custom, and that according to such the Defendant-Respondent had made internet sales (¶10 - ¶12, R. 287 and R. 289 – 293); and, that the Defendant-Respondent had belatedly introduced an Answer (¶15, R. 288).

Furthermore, the Motion itself was made "on all prior pleadings and proceedings" (R. 305), and the Affidavit of Maggie Burbano, in support of the Motion, incorporated the Plaintiff-Appellant's Summons and Complaint as an exhibit, placing it before the Court on the Motion (R.307). In that Summons and Complaint, the Plaintiff-Appellant swore to damages resulting from reliance upon the breached contract (R. 312). Similarly, in an Affidavit which had previously come before the Court, Mark

As the only issue that had been brought before the Lower Court on the original papers supporting the Defendant-Respondent's Motion for Summary Judgment (distinguished from the Defendant-Respondent's reply papers) was merely that the Defendant-Respondent "never made any sales of any kind over the internet"[176] and that, thus, there were no damages,[177] the aforementioned evidence presented by Mark Hynes on the Motion was more than adequate to defeat the Defendant-Respondent's Motion for Summary Judgment – despite the Defendant-Respondent's attempts in its Respondent Brief to argue that an improper sur-reply can be used to establish a *prima facie* case.

Given the foregoing analysis, if the Lower Court "found that the affidavit submitted by Plaintiff-Appellant in opposition to the motion failed to rebut the *prima facie* showing of no sales by Sonido" (as the Defendant-Respondent claims),[178] then the Lower Court would have nonetheless committed error on two counts: First, because the party opposing the Motion only has a burden of production, not of disproving the moving party's assertions;[179] and, Secondly, because the Defendant-Respondent never established a *prima facie* case that it "never made

---

Hynes swore that he expended labor and funds in reliance upon the Contract, and that he was never paid. (R. 91 – 92).

[176] Please see R. 300 – 301.

[177] Please see R. 310.

[178] Please see Defendant-Respondent's Brief at P. 10.

[179] Sommer v. Federal Signal Corp., 79 N.Y.2d 540, 555, 583 N.Y.S.2d 957, 593 N.E.2d 1365 (1992); Zuckerman v. City of New York, 49 N.Y.2d 557, 563, 427 N.Y.S.2d 595, 598, 404 N.E.2d 718 (1980); Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 318, 476 N.E.2d 642, 643 (1985); Cugini v. System Lumber Co., Inc., 111 A.D.2d 114, 489 N.Y.S.2d 492 (1st Dep't 1985).

any sales of any kind over the internet"[180] — *since it* never brought its interpretation in favor of limiting the contract to sales made *directly* by Sonido, Inc. on the original motion papers (or even in its belated Answer, for that matter).[181]

Realizing the error of law that would be needed as a basis for the Defendant-Respondent to be correct as to its claim that the process followed by the Lower Court in arriving at its judgment is of tantamount importance, as the Defendant-Respondent now appears to be arguing in its Brief that the Lower Court adopted its interpretation (an interpretation of the contract that the Defendant-Respondent had never even placed in its Answer)[182] as a grounds for denying both the evidence that the Plaintiff-Appellant nonetheless offered for his interpretation of the contract, as well as the evidence he offered in support of there having been Internet sales made by the Defendant-Respondent.[183]

It is troubling to note, in light of this claim by the Defendant-Respondent, that the Lower Court gives its own account of the circumstances underlying the formation of the contract (an account not settled by a fact-finder, and nonetheless given in the face of evidence produced by the Plaintiff-Appellant) as its ground for reading the contract to be limited to direct sales made by the Defendant-Respondent.[184] If the Court's own unsettled account of the factual circumstances surrounding the formation of the contract was truly based upon information interposed for the first time in the reply papers, as the Defendant-Respondent now seems to be arguing,

---

[180] Please see R. 300 – 301.

[181] Compare R. 305 – 328 to R. 294 – 301. See also R. 288.

[182] Please see R. 302 – 304.

[183] Please see Defendant-Respondent's Brief at PP. 10-11.

[184] Please see R. 30.

then the Plaintiff-Appellant was not only deprived of his right to have issues of fact concerning the meaning of his contract determined by a fact-finder,[185] but was also deprived of due process on the summary judgment motion.[186]

REPLY TO SECOND POINT:
THE DEFENDANT-RESPONDENT IS INCORRECT IN STATING THAT THE COURT BELLOW CORRECTLY INTERPRETED THE AGREEMENT BETWEEN THE PARTIES

In the section that follows, the Plaintiff-Appellant will address each of the three sub-points addressed

---

[185] State v. R.J. Reynolds Tobacco Co., 304 A.D.2d 379, 761 N.Y.S.2d 596 (1st Dep't 2003); Amusement Business Underwriters, a Div. of Bingham & Bingham, Inc. v. American International Group, Inc., et al., 66 N.Y.2d 878, 880, 489 N.E.2d 729 (1985); Ehrlich v. Abrams Instrument Corp., 385 N.Y.S.2d 299, (1st Dep't 1976); Briarwood Towers 85th Co. v. Guterman, 523 N.Y.S.2d 98 (1st Dep't 1988); Time Warner Entertainment Co., L.P. v. Brustowsky, 634 N.Y.S.2d 82 (1st Dep't 1995); Steckler v. Steckler, 433 N.Y.S.2d 127 (1st Dep't 1980); Tri-State Pipe Lines Corp. v. Sinclair Refining Co., 264 N.Y.S.2d 138 (1st Dep't 1965).

[186] Ressis v. Mactye, 98 A.D.2d 836, 470 N.Y.S.2d 502 (3d Dep't 1983); People v. Minota, 137 A.D.2d 837, 525 N.Y.S.2d 300 (2d Dep't 1988), citing State Farm Fire and Cas. Co. v. LiMauro, 103 A.D.2d 514, 481 N.Y.S.2d 90 (2d Dep't 1984), aff'd, 65 N.Y.2d 369, 492 N.Y.S.2d 534, 482 N.E.2d 13 (1985). See also People v. Ford, 69 N.Y.2d 775, 513 N.Y.S.2d 106, 505 N.E.2d 615 (1987); see also CPLR 2214; Voytek Technology, Inc. v. Rapid Access Consulting, Inc., 279 A.D.2d 470, 719 N.Y.S.2d 112, 2001 N.Y. Slip Op. 00236 (2d Dep't 2001); Klimis v. Lopez, 290 A.D.2d 538, 736 N.Y.S.2d 697, 2002 N.Y. Slip Op. 00601 (2d Dep't 2002); Dannasch v. Bifulco, 184 A.D.2d 415, 416-417, 585 N.Y.S.2d 360 (1st Dep't 1992). See also Levitz v. Robbins Music Corp., 17 A.D.2d 801, 801, 232 N.Y.S.2d 769, 770 (1st Dep't 1962).

by the Defendant-Respondent with corresponding headings.

1. THE LANGUAGE IN THE CONTRACT WAS LATENTLY AMBIGUOUS DUE TO INFERENCES RAISED FOR THE FIRST TIME IN THE DEFENDANT-RESPONDENT'S REPLY PAPERS, NONETHELESS, A PLAIN READING OF THE CONTRACT WOULD BE IN FAVOR OF THE PLAINTIFF-APPELLANT:

Although the Defendant-Respondent is correct in stating that it is black letter law that the interpretation of an unambiguous contract provision is a question of law, and as such, a matter for the court,[187] it is incorrect in stating that the contract does not contain ambiguous language.

In support of its claim that the contract is not ambiguous, the Defendant-Respondent makes an appeal to the Plain Meaning Rule,[188] which would be mistaken as the rule is to be applied in situations where the contract is not ambiguous,[189] and as other rules of law are the appropriate rules for *determining* if a contract is ambiguous.[190]

Furthermore, by the Defendant-Respondent's own admission, the Court did not apply the Plain

---

[187] Lake Const. & Development Corp. v. City of New York, 211 A.D.2d 514, 515, 621 N.Y.S.2d 337 (1st Dep't 1995).

[188] Please see Defendant-Respondent's Brief at P. 12.

[189] Evans v. Famous Music Corp., 1 N.Y.3d 452, 458, 775 N.Y.s.2d 757, 761, 807 N.E.2d 869 (2004).

[190] Greenfield v. Philles Records, Inc., 98 N.Y.2d 562, 570, 750 N.Y.S.2d 565, 570, 780 N.E.2d 166 (2002); Teichman by Teichman v. Community Hosp. of Western Suffolk, 87 N.Y.2d 514, 520, 640 N.Y.S.2d 472, 474, 663 N.E.2d 628, 20 Employee Benefits Cas. (BNA) 1532 (1996); Lucente v. International Business Machines Corp., 310 F.3d 243, 257, 29 Employee Benefits Cas. (BNA) 2414 (2d Cir. 2002); Collins v. Harrison-Bode, 303 F.3d 429, 433 (2d Cir. 2002); Golden Pacific Bancorp v. F.D.I.C., 273 F.3d 509, 516 (2d Cir. 2001).

Meaning Rule but, as it cites to the record in its own Brief,[191] includes a statement from the Lower Court in which the Lower Court claims to have relied upon its assessment of the circumstances surrounding the formation of the contract, and, consequently, not upon the Plain Meaning Rule.[192] If such is the case, by the Court's own admission, the contract was not interpreted as a pure matter of law, but based upon a factual record that was never determined by the fact finder.

A further problem arises for the Defendant-Respondent if it seeks application of the Plain Meaning Rule in that the language of the contract – if interpreted separately from any factual record – supports the Plaintiff-Appellant's interpretation, and not that of the Defendant-Respondent. The contract, which reads:

> "It is hereby stipulated and agreed by and between Sonido, Inc. and Mark T. Hynes that Sonido, Inc. will pay Mark T. Hynes, ten percent (10%) of all sales made and paid for via the internet, of music, videos, art, words, and advertisement."[193]

As pointed out in the Plaintiff-Appellant's Brief, nowhere in the plain language of the contract are sales limited to sales made directly by Sonido, Inc., and nowhere in the contract are the words "direct" or "website" used.[194] This is important to note as there is a stark distinction between the terms "website" or "WebPage" and the term "Internet." Numerous

---

[191] Please see Defendant-Respondent's Brief at P. 11.

[192] Id.

[193] Please see R. 74.

[194] Please see Footnote 74 of Plaintiff-Appellant's Brief at P. 28.

websites and WebPages appear on and over the Internet, but the Internet itself, as well as what is conducted over it, is in no way confined to a website or even a multitude of websites.[195] Furthermore, the term "all" is used to modify the Internet sales referenced in the contract – thereby making the contract applicable to all sales made over the internet method as the Plaintiff-Appellant alleged in his Complaint six years prior to the Motion.[196] If the language of the contract is taken at its face value – separate from any outside input – then the plain meaning of the contract is that Sonido has given Mark Hynes an interest in ten percent (10%) of all sales made by the Internet method – with no included limitation as to who made the sales of Sonido "music, videos, art, words, and advertisement."[197]

Furthermore, the Plain Meaning Rule stands for the rationale that a party has no right to induce another to enter into a contract with him or her on the supposition that his or her words would mean one thing to the other party at the time of contracting while hoping that a court would thereafter give the words a construction more advantageous to him or her.[198] As stated, both a plain reading of the contractual language and the averments advanced in the Plaintiff-Appellant's Verified Complaint support a reading where the contract applies to all Internet sales to which Sonido,

---

[195] Please see Footnote 40 *infra*, at P. 12.

[196] Please see ¶16 of Plaintiff-Appellant's Verified Complaint at R. 37.

[197] Please see R. 74.

[198] Gaultney-Klineman Art v. Hughes, 227 A.D.2d 221, 642 N.Y.S.2d 265, 32 U.C.C. Rep. Serv. 2d 421 (1st Dep't 1996); Conopco, Inc. v. Wathne Ltd., 190 A.D.2d 587, 593 N.Y.S.2d 787 (1st Dep't 1993).

Inc. has right. Consequently, for the Defendant-Respondent to seek to take advantage of a latent ambiguity that it did not bring before the Court until its reply papers runs contrary to the purpose of the Plain Meaning Rule.

If the Defendant-Respondent truly seeks application of the Plain Meaning Rule, then it consents to all terms in the contract being understood in their plain, ordinary, and popular meanings[199] – meanings that should be supplied by reference to the dictionary and relevant treatises that supply the accepted meanings of the term, or terms, in question.[200]

---

[199] Lopez v. Fernandito's Antique, Ltd., 305 A.D.2d 218, 760 N.Y.S.2d 140 (1st Dep't 2003); Benderson v. Wiper Check Inc., 266 A.D.2d 903, 697 N.Y.S.2d 448 (4th Dep't 1999), order aff'd, 96 N.Y.2d 855, 730 N.Y.S.2d 29, 754 N.E.2d 1112 (2001).

[200] See R/S Associates v. New York Job Development Authority, 98 N.Y.2d 29, 33, 744 N.Y.S.2d 358, 360, 771 N.E.2d 240 (2002) (consulting dictionary for definition of "effective" when construing the phrase "effective cost of funds"); Mazzola v. County of Suffolk, 143 A.D.2d 734, 735, 533 N.Y.S.2d 297 (2d Dep't 1988) (consulting dictionary for meaning of 'condemned' and 'condemnation'); see also Succo v. First Reliance Standard Life Ins. Co., 16 Fed. Appx. 53 (2d Cir. 2001); S.E.C. v. Eberhard, 2006 WL 17640, * 3 n. 7 (S.D. N.Y. 2006); Citadel Equity Fund Ltd. v. Aquila, Inc., 371 F. Supp. 2d 510 (S.D. N.Y. 2005), aff'd, 168 Fed. Appx. 474 (2d Cir. 2006).

It should be noted that the 1997 dictionary defines "Internet" as "a large computer network linking smaller computer networks worldwide. [1990-95]" RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 683 (Sol Steinmetz ed., 2nd ed. 1997). While "WebPage" is defined as "a single, usu. hypertext document on the Word Wide Web that incorporate text, graphics, sounds, etc." RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1456 (Sol Steinmetz ed., 2nd ed. 1997). "World Wide Web" is itself defined as "a system of extensively linked hypertext documents: a branch of the Internet. *Abbr.* WWW [1990-95]" RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1482 (Sol Steinmetz ed., 2nd ed. 1997).

In summary, and given what is stated above, if the Defendant-Respondent's argument that the Plain Meaning Rule was to be applied as a matter of law is taken to its natural conclusion, then the Lower Court would have committed at least two other errors, as it did not apply the rule properly (seeing that it relied upon factual determinations outside of the language of the contract), and because it did not apply the common, ordinary, and popular meanings of the terms "Internet" and "all".

Finally, when the Defendant-Respondent states that it "is difficult to imagine how Sonido, a company exclusively engaged in the business of music production, would sell 'words' or 'advertisement' through third-parties' websites"[201], it not only ignores the position advanced in the Plaintiff-Appellant's Verified Complaint[202] (a position

---

Similarly, the definition of "Internet payment" as supplied by Black's Law Dictionary is listed under "Cyberpayment", which is itself defined as "A transfer of money over the Internet, usu. through a payment service. – Also termed *Internet Payment*." BLACK'S LAW DICTIONARY 414 and 836 (Bryan A. Garner ed., 8th ed. 2004).

[201] Please see Defendant-Respondent's Brief at P. 13.

[202] In ¶6a(a) of his Verified Complaint, Plaintiff-Appellant states that one purpose of the contract was to develop "internet websites" in the plural as well as "other electronic means" to "advertise the defendants' (sic) products and to generate sales." R. 36. Added to this, ¶16 of the Complaint states that it "was the intent of the parties that *all* sales of Sonido products which result in income from *any source* by the *internet method* would generate income for Sonido and Mark T. Hynes by the internet method." R. 37 (emphasis added). Finally, the Plaintiff-Appellant stated in his Complaint, at ¶17, that the contract also concerned "licenses", which means that the Plaintiff-Appellant's Complaint has always presented sworn evidence that the intent of the parties was to include the revenue from royalties.

As mentioned earlier (Footnote 15, P. 4 *supra*), this evidence was before the Court on the Motion.

advanced roughly seven years prior), but also continues to limit the contract to "websites" (a term that is not included in the plain meaning of the contract). Thus, when Defendant-Respondent denies that the contract is applicable to royalties, it merely continues to ignore the Plaintiff-Appellant's previously mentioned position, [203] as well as the plain meanings of the terms "all" and "Internet."

2. THE INTERPRETATION BY THE COURT BELLOW DID NOT CONFORM TO GOVERNING PRECEDENTS REGARDING THE INTERPRETATION OF CONTRACTS:

As with the second section of this Reply Brief, the following subsection address each of the sub-points presented by the Defendant-Respondent, and will correspondingly address each of the seven subheadings listed by the Defendant-Respondent.

Although not under a subheading, the Defendant-Respondent begins the section by stating that the Plaintiff-Appellant failed to introduce admissible evidence due to the impact of the Dead Man Statute, CPLR 4519.[204] Not only does this argument ignore the fact that the Plaintiff-Appellant produced evidence of trade usage and newspaper publications stating the purpose of the contract,[205] which are most certainly not excluded by operation of CPLR 4519, but it also ignores the fact that if the Lower Court had proceeded with summary judgment on the grounds of having first excluded the Plaintiff-Appellant's Affidavit testimony,[206] then it would have in fact not conformed its holding to governing

---

[203] Id.

[204] Please see Defendant-Respondent's Brief at P. 16.

[205] Please see R. 286 – 293.

[206] Something that is indicated nowhere in the record.

precedent, as the Dead Man Statute will not be used to preclude a non-moving party from meeting its burden on a summary judgment motion.[207]

Furthermore, not only did the Defendant-Respondent fail to meet its burden of establishing a *prima facie* case, as discussed in the previous section, but the Defendant-Respondent, as the moving party, is also precluded from introducing arguments it did not make on the Motion before the Lower Court.[208]

A. INTERPRETATION IN LIGHT OF THE CONTRACT'S PURPOSE:

The Defendant-Respondent argues that the Lower Court interpreted the contract in accordance with the purpose for which it was created per Plaintiff-Appellant's own admission "the intention of Sonido in entering the 1997 Agreement was to sell music through a website www.latinmusic.com..."[209] What the Defendant-Respondent fails to note, however, it that the referenced portions of the record state quite the opposite, as the Plaintiff-Appellant's statements

---

[207] Phillips v. Joseph Kantor & Co., 31 N.Y.2d 307, 338 N.Y.S.2d 882, 291 N.E.2d 129 (1972). See also Raybin v. Raybin, 15 A.D.2d 679, 224 N.Y.S.2d 165 (2d Dep't 1962)

[208] See also 440 East 62nd Street Owners Corp. v. 440 East 62nd Street Associates, L.P., 217 A.D.2d 426, 629 N.Y.S.2d 44 (1st Dep't 1995); P.T. Bank Central Asia v. Chinese American Bank, 229 A.D.2d 224, 654 N.Y.S.2d 117 (1st Dep't 1997) Daubman v. Nassau County Civil Serv. Comm'n, 195 A.D.2d 602, 601 N.Y.S.2d 14 (2d Dep't 1993) (citations omitted). See also Zafonte v. Steinhammer, 277 A.D.2d 450, 715 N.Y.S.2d 896 (2d Dep't 2000); Puderbaugh v. State Employees Federal Credit Union, 276 A.D.2d 992, 714 N.Y.S.2d 387 (3d Dep't 2000) ("the issue was not raised in Supreme Court and is, therefore, not reviewable" (citation omitted)).

[209] Please see Defendant-Respondent's Brief at P. 17 (citing R. 61).

that Defendant-Respondent cites[210] refer to multiple "*websites*" and "*other electronic means*" – clearly not limiting the contract to sales made directly by the Defendant-Respondent over a single website.

Furthermore, to adopt such an unfavorable reading of the Plaintiff-Appellant's statements on a motion for summary judgment not only violates the rule that all evidence should be read in a light most favorable to the non-moving party,[211] but also violates the rule that any conflicting testimony (especially in cases where the conflict is illusory and based wholly upon a strained reading offered by the moving party) itself creates an issue of fact precluding summary judgment.[212] It should be noted that both of these principles are themselves intricately linked to the rule that a court should not attempt factual determination on a motion for summary judgment.[213]

B. THE RULE AGAINST THE ADDITION OF TERMS:

The Defendant-Respondent argues that the Lower Court did not violate the rule against the addition of terms because the Lower Court applied the Plain Meaning Rule along with the its assessment of the purpose of the parties for entering the agreement. As stated earlier in this Brief, the Lower Court did

---

[210] Please see Defendant-Respondent's Brief at P. 17.

[211] Weiss v. Garfield, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dep't 1964).

[212] Dollas v. W.R. Grace and Company, et al., 225 A.D.2d 319, 639 N.Y.S.2d 323, Prod.Liab.Rep (CCH) P 14,613 (1st Dep't 1996); Natale v. Woodcock, et al., 35 A.D.3d 1128, 830 N.Y.S.2d 785, 2006 N.Y. Slip Op. 09985 (3d Dep't 2006).

[213] Schulman, 2 A.D.3d 355, 770 N.Y.S.2d 48, 51 (1st Dep't 2003); Esteve v. Abad, 271 A.D. 725, 727, 68 N.Y.S.2d 322, 324 (1st Dep't 1947).

not apply the Plain Meaning Rule, and any assessment of the purpose behind the parties' Agreement that it would have relied upon would have inevitably rested on a factual determination not settled by a fact-finder, which is error.[214]

Though Defendant-Respondent states that it is Mark Hynes who tries to add terms to the agreement by arguing that the intent of the contract was to account for royalties, the Defendant-Respondent itself offers an account where royalties are to be taken as sales, as it states "Sonido would only have paid a commission to Hynes if Sonido had itself received payment for the goods sold via the internet."[215]

C. THE CONTRACT MUST BE INTERPRETED AS A WHOLE:

The Defendant-Respondent appears to argue that on account of the contract in question not being complex, it is not necessary to interpret all of its terms.[216] This, however, runs contrary to governing precedent, which states that a court should strive to give meaning to every sentence, clause and word.[217]

D. THE RULE OF CONSISTENCY:

---

[214] Please see P. 7, *supra*.

[215] Please see Defendant-Respondent's Brief at P. 19. Also, it should be noted that Black's Law Dictionary defines "royalty" as: "A payment made to an author or inventor for each copy of a work or article sold under copyright or patent." BLACK'S LAW DICTIONARY 1356 (Bryan A. Garner ed., 8th ed. 2004).

[216] Please see Defendant-Respondent's Brief at P. 18.

[217] Travelers Cas. and Sur. Co. v. Certain Underwriters at Lloyd's of London, 96 N.Y.2d 583, 594, 734 N.Y.S.2d 531, 538, 760 N.E.2d 319, 32 Envtl. L. Rep. 20262 (2001).

Contrary to what is argued by Defendant-Respondent,[218] the consistency referred to in the Rule of Consistency is internal consistency, and not consistency with a factual record derived separately from settlement by the fact-finder.[219]

E. THE RULE THAT CONDITIONS WILL BE DISFAVORED:

The evidence on the record that the Lower Court read a condition into the contract is revealed clearly in the Appellant Brief.[220] No further argument is required here.

It should also be noted that the issue by Defendant-Respondent with Plaintiff-Appellant's argument[221] that any position denying damages (despite the elements for a claim of unjust enrichment being mentioned in the Plaintiff-Appellant's Complaint)[222] would ultimately lead to both an absurd and an unjust result, amounts to no more than a failure to understand the reasoning behind a *reductio ad absurdum* argument, or is merely an attempt at obfuscation.

F. THE RULE AGAINST FORFEITURE:

The evidence on the record that the Lower Court read a condition into the contract, and that it thereby rendered the contract illusory, is revealed clearly in

---

[218] Please see Defendant-Respondent's Brief at P. 20.

[219] Lashins Arcade Co. v. Jorling, 221 A.D.2d 533, 536, 634 N.Y.S.2d 138, 141 (2d Dep't 1995).

[220] Please see Footnote 145 of Plaintiff-Appellant's Brief at P. 44.

[221] Please see Defendant-Respondent's Brief at P. 21.

[222] Please see ¶6a of Plaintiff-Appellant's Complaint at R. 36.

the Appellant Brief.[223] No further argument is needed here.

G. CONSTRUCTION AGAINST THE DRAFTSMAN:

The Defendant-Respondent's argument against the rule that a contract should be strictly construed against the drafting party rests on its argument that the contract is not ambiguous.[224] As the contract is ambiguous as a matter of law,[225] the contract should, consequently, be interpreted strictly against the drafting party.

3. THE DEFENDANT-RESPONDENT IS INCORRECT IN STATING THAT MARK HYNES FAILED TO SUBMIT ANY EVIDENCE TO THE LOWER COURT IN SUPPORT OF HIS INTERPRETATION:

As stated earlier in this Reply Brief,[226] as well as in the Appellant Brief,[227] the Plaintiff-Appellant more than met his burden of production, as the only issue of fact presented in the Motion was whether the Defendant-Respondent had made Internet sales "of any kind."[228] It was not until the Defendant-Respondent's reply that it argued that the contract in

---

[223] Please see Footnote 145 of Plaintiff-Appellant's Brief at P. 44.

[224] Please see Defendant-Respondent's Brief at P. 23.

[225] Greenfield v. Philles Records, Inc., 98 N.Y.2d 562, 570, 750 N.Y.S.2d 565, 570, 780 N.E.2d 166 (2002); Teichman by Teichman v. Community Hosp. of Western Suffolk, 87 N.Y.2d 514, 520, 640 N.Y.S.2d 472, 474, 663 N.E.2d 628, 20 Employee Benefits Cas. (BNA) 1532 (1996).

[226] Please see P. 2, *supra*.

[227] Please see Plaintiff-Appellant's Brief, PP. 7-34, particularly Footnote 57 in Plaintiff-Appellant's Brief at P. 23.

[228] Please see Defendant-Respondent's Brief at P. 9, and R. 300 – 301.

question was limited to direct sales made by Sonido, Inc.[229] – a point that must necessarily be established *prima facie* before any alleged failure to providing evidence of direct sales would result in a non-moving party's failure to meet its burden on the Motion.[230]

Consequently, the burden did not shift to the Plaintiff-Appellant to produce evidence on the motion – though the evidence provided by Mark Hynes would overcome the motion (if such issue had been raised on the original Notice of Motion), as it is not merely evidence of the meaning and purpose of the contract, but evidence of breach as well.[231]

REPLY TO THIRD POINT

THE DEFENDANT-RESPONDENT IS INCORRECT IN STATING THAT THE COURT BELLOW PROPERLY FOUND THAT THE ABSENCE OF SALES EQUALED AN ABSENCE OF DAMAGES

In the section that follows, the Plaintiff-Appellant will address each of the three sub-points addressed by the Defendant-Respondent with corresponding headings.

1. THE PLAINTIFF-APPELLANT'S DELAY IN SEEKING DISCOVERY DID NOT WARRANT SUMMARY JUDGMENT:

The Defendant-Respondent alleges that Mark Hynes failed through his own inaction to seek discovery for many years.[232] Not only does this argument ignore the reasoning behind such delay given by Plaintiff-Appellant (who stated – perhaps

---

[229] Compare R. 305 – 328 to R. 294 – 301.

[230] Sommer v. Federal Signal Corp., 79 N.Y.2d 540, 555, 583 N.Y.S.2d 957, 593 N.E.2d 1365 (1992).

[231] Please see Footnote 57 in Plaintiff-Appellant's Brief at P. 23.

[232] Please see Defendant-Respondent's Brief at P. 26.

misguidedly – that he believed it necessary for the Defendant-Respondent to interpose an Answer before discovery could begin),[233] but also ignores the rule that summary judgment should not be granted when an issue of fact is actually presented.[234]

2. THE DEFENDANT-RESPONDENT IS INCORRECT IN STATING THAT THE PLAINTIFF-APPELLANT'S FAILURE TO ALLEGE BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING ON THE MOTION CONSTITUTED A FAILURE TO PRESENT AN ISSUE OF MATERIAL FACT:

Defendant-Respondent's second argument under this point is that the presence of evidence on the record that the Defendant-Respondent breached its implied covenant of good faith and fair dealing should not be counted as grounds for determining that the Lower Court committed error because that argument was not raised before the Court bellow.[235]

The fact that an argument was not made before the Court bellow, however, does not necessarily prevent the issue from arising on appeal, as a court sitting on a motion for summary judgment must consider all of the causes of action that may arise from the facts before it as part of viewing the

---

[233] Please see R. 288.

[234] Falk v. Goodman, 7 N.Y.2d 87, 91, 195 N.Y.S.2d 645, 647, 163 N.E.2d 871, 873 (1959); Jones v. U.S. Healthcare, 282 A.D.2d 347, 723 N.Y.S.2d 478 (1st Dep't 2001).

Furthermore, issues surrounding the Defendant-Respondent's delay in joining issue seem to not only account for the Plaintiff-Appellant's delay, but affect Defendant-Respondent's claim of right to bringing the Motion in the first place. Soltes v. 260 Waverly Owners, Inc., 840 N.Y.S.2d 412 (2d Dep't 2007). Kline v. Town of Guilderland, 734 N.Y.S.2d 333 (3d Dep't 2001).

[235] Please see Defendant-Respondent's Brief at P. 27.

evidence in a light most favorable to the non-moving party.[236]

Furthermore, the Defendant-Respondent's argument ignores the fact that the presence of evidence on the record that it breached its implied duty undercuts any claim that it may have to establishing a prima facie case of entitlement as a matter of law, as a judgment founded on an untenable theory of law should not be sustained.[237]

Also, and as stated earlier,[238] the fact that the Defendant-Respondent did not bring up the issue of whether the contract was limited to direct sales until its Reply means that the burden never shifted to the Plaintiff-Appellant to produce any evidence but that concerning the issue that was brought on the motion.

Also of note, and contrary to the scope of the argument for preclusion presented by Defendant-Respondent, it argues that the contract in question contained no provision setting forth the Plaintiff-Appellant's obligations, and that as a consequence

---

[236] CPLR 3212(b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding as a matter of law "that there is no defense to the cause of action or that the cause of action or defense has no merit." See also Wiener v. Lazard Freres & Co., 241 A.D.2d 114, 672 N.Y.S.2d 8, 13 (lst Dep't 1998); Weiss v. Garfield, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dep't 1964).

As the relief sought and granted on the motion was to dismiss the complaint (R. 305), the Court was under a duty to determine if, from within the four corners of the complaint, Plaintiff-Appellant had stated any cognizable cause of action. Glassman v. Catli, et al., 11 A.D.2d 744, 745 489 N.Y.S.2d 777, 778 (2d Dep't 1985).

[237] Id. Also see Rives v. Bartlett, 215 N.Y. 33, 37, 109 N.E. 83, 84 (1915); Salzano v. Pellillo, 4 A.D.2d 789, 790, 165 N.Y.S.2d 550, 553 (2d Dep't 1957); Wenger v. Goodell, 288 A.D.2d 815, 816-817, 733 N.Y.S.2d 523, 524-525 (3d Dep't 2001).

[238] Please see PP. 4 –7, *supra*.

there is no mutuality of obligation.[239] Not only is this an argument that Defendant-Respondent did not make on the original motion nor as a defense asserted in its Answer, but it also contradicts the position argued previously by the Defendant-Respondent and should not be considered under the Doctrine of Judicial Estoppel.[240]

Nonetheless, the Defendant-Respondent's argument itself is faced with difficulties, as New York courts have found the necessary intent to be bound in contractual obligation even where the parties' agreement appears to leave an essential term open, or even when the agreement is incomplete on its face.[241] Furthermore, the Agreement does have the necessary exchange of obligations on its face, as it is a stipulation and an assignment of rights.[242]

---

[239] Please see Defendant-Respondent's Brief at P.31.

[240] Dennis' Natural Mini-Meals, Inc. v. 91 Fifth Avenue Corp., 209 A.D.2d 262, 618 N.Y.S.2d 771 (1st Dep't 1994). Defendant-Respondent argued a release of a contract, and stated on oath, as well as on the motion papers, that Mark Hynes had exchanged an obligation for the obligations assumed by Sonido, Inc. under said contract. R. 250 & 297. See also CPLR 3018(b) and CPLR 3025(a); Linton v. Unexcelled Fire-Works Co., 124 N.Y. 533, 27 N.E. 406 (1891); City of Rochester v. Diksu Corp., 47 Misc.2d 407, 262 N.Y.S.2d 690 (Sup.Ct., Monroe County, 1965).

[241] 166 Mamaroneck Ave. Corp. v. 151 East Post Road Corp., 78 N.Y.2d 88, 91, 571 N.Y.S.2d 686, 688, 575 N.E.2d 104 (1991); Kleinschmidt Division of SCM Corp. v. Futuronics Corp., 41 N.Y.2d 972, 395 N.Y.S.2d 151, 363 N.E.2d 701, 21 U.C.C. Rep. Serv. 422 (1977); see also Marquette Co. v. Norcem, Inc., 114 A.D.2d 738, 739, 494 N.Y.S.2d 511, 512–13, 42 U.C.C. Rep. Serv. 79 (3d Dep't 1985); Dimario v. Coppola, 10 F. Supp. 2d 213, 219 (E.D. N.Y. 1998).

[242] Please see R. 74. Nolfi Masonry Corp. v. Lasker-Goldman Corp., 160 A.D.2d 186, 553 N.Y.S.2d 156 (1st Dep't 1990); N.Y. Gen. Oblig. Law § 5-1103; Hamer v. Sidway, 124 N.Y. 538, 27

3. THE DEFENDANT-RESPONDENT IS INCORRECT IN STATING THAT THE PLAINTIFF-APPELLANT'S FAILURE TO ALLEGE BREACH BY REPUDIATION ON THE MOTION CONSTITUTED A FAILURE TO PRESENT AN ISSUE OF MATERIAL FACT:

As with the preceding sub-point, the fact that an argument was not made before the Court bellow does not necessarily prevent the issue from arising on appeal, as a court sitting on a motion for summary judgment must consider all of the causes of action that may arise from the facts before it as part of viewing the evidence in a light most favorable to the non-moving party.[243] Evidence of repudiation was certainly present on the record and before the Court,[244] and should have precluded the dismissal of the Plaintiff-Appellant's Complaint.[245]

In addition, Defendant-Respondent is incorrect in stating that the Doctrine of Repudiation would not allow a non-breaching party to establish breach due to lack of performance by the breaching party,[246] as the Doctrine was developed for that very purpose – to grant a plaintiff total damages (including expectation damages) for lack of performance by the breaching party.[247]

N.E. 256 (1891); All Terrain Properties, Inc. v. Hoy, 265 A.D.2d 87, 93, 705 N.Y.S.2d 350, 355 (1st Dep't 2000). See also N.Y. Gen. Oblig. Law § 5-1107; Jemzura v. Jemzura, 36 N.Y.2d 496, 504, 369 N.Y.S.2d 400, 408, 330 N.E.2d 414 (1975).

[243] Please see PP. 21-23 *supra*, particularly Footnote 77.

[244] R. 9, 166, 207 – 208, 227 & 230.

[245] Please see PP. 21-23 *supra*, particularly Footnote 77.

[246] Please see Defendant-Respondent's Brief at Pp. 34-35.

[247] Long Island R. Co. v. Northville Industries Corp., 41 N.Y.2d 455, 463, 393 N.Y.S.2d 925, 930, 362 N.E.2d 558 (1977); Rachmani Corp. v. 9 East 96th Street Apartment Corp., 211

CONCLUSION

Given all that has been heretofore stated, it is respectfully requested of this Court that it reverse the Lower Court's grant of summary judgment to the Defendant-Respondent, and that it grant a decision in accord with the rules of law stated herein.

By: s/ Robert M. Shafran, Esq.
Robert M. Shafran, Esq.
LAW OFFICES OF ANATTA LEVINSKY, P.C.
6924 Bay Parkway
Brooklyn, New York 11204
(718) 837-5555

A.D.2d 262, 266, 629 N.Y.S.2d 382, 385 (1st Dep't 1995); Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp., 92 N.Y.2d 458, 463, 682 N.Y.S.2d 664, 667, 705 N.E.2d 656, 37 U.C.C. Rep. Serv. 2d 323 (1998).

APPENDIX K

SUPREME COURT OF THE SATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

MARK HYNES,
Plaintiff-Appellant,

-against- **Index No.:** 604046/00

SONIDO, INC.,
Defendant-Respondent.

AFFIRMATION IN SUPPORT OF MOTION FOR REARGUMENT OR LEAVE TO APPEAL

STATE OF NEW YORK
COUNTY OF KINGS

JOSHUA HERNANDEZ, ESQ., affirms the following under the penalties of perjury:

1. I am an attorney duly admitted to practice in the Courts of the State of New York and am associated in this matter with the LAW OFFICES OF ANATTA LEVINSKY, P.C., attorneys of record for the above-named Plaintiff-Appellant.

2. I assisted in the drafting of both the Brief for Plaintiff-Appellant and the Reply Brief for Plaintiff-Appellant in the above-captioned matter, and as such, I am familiar with the facts and with the questions of law involved in this appeal.

3. This affirmation is submitted in support of an application by the Plaintiff-Appellant for reargument of the appeal or, in the alternative, for leave to appeal to the Court of Appeals.

4. The appeal involved was taken from an order and decision of the Supreme Court in and for the County of New York, dated February 5, 2008. Attached to this Affirmation as **Exhibit 1** is a copy of the order of unanimous affirmance made by this Court and entered on April 3, 2008.

5. This Court unanimously affirmed the aforementioned order and decision of the Supreme Court in and for the County of New York, which granted Defendant-Respondent's Motion for Summary Judgment dismissing the Plaintiff-Appellant's Complaint on the grounds that the Plaintiff-Appellant (Plaintiff at the time of the motion) had sustained no damages. (R. 7 – 33 & 305). Attached as **Exhibit 2** is a copy of the original order and decision of the Supreme Court in and for the County of New York.

6. It is respectfully submitted that this Court misapplied a principle of law because it affirmed the Supreme Court's decision "upon an examination of the intent of the parties within the four corners of the agreement, as well as the circumstances under which it [the contract] was executed." (Please see **Exhibit 1**). To the contrary, governing precedent prohibits a court from determining the intent of the parties from the four corners, or from the circumstances under which the agreement was executed, when there is conflicting extrinsic evidence regarding the

parties' intent. (Please see accompanying Memorandum of Law at Paragraph 1. Please also see Brief for Plaintiff-Appellant at pp.22 – 28).

7. It is respectfully submitted that this Court misapplied a principle of law in that it affirmed the Supreme Court's decision dismissing the Plaintiff-Appellant's Complaint on the grounds that the Plaintiff-Appellant had sustained no damages, despite governing precedent which prohibits a court from dismissing a complaint if there is any cognizable claim that can be gleaned from the four corners of the complaint. (Please see accompanying Memorandum of Law at Paragraph 2. Please also see Brief for Plaintiff-Appellant at pp.11 – 22, and Reply Brief for Plaintiff-Appellant at p.21). With regard to the present case, Plaintiff-Appellant's complaint, as well as a search of the record, reveal causes of action for reliance, repudiation, and breach of the covenant of good-faith and fair dealing. (Please see Brief for Plaintiff-Appellant at pp.11 – 22, and Reply Brief for Plaintiff-Appellant at p.21). Such causes of action would still be actionable despite the interpretation of the contract affirmed by the Court. (Please see Brief for Plaintiff-Appellant at pp.11 – 22, and Reply Brief for Plaintiff-Appellant at p.21. Please also see R.36).

8. It is respectfully submitted that this Court misapplied a principle of law in that it affirmed the Supreme Court's decision based upon its finding that "the relevant contract term – '10% of all income from sales made by the internet' – is unambiguous." (Please see **Exhibit 1**). To the contrary, governing precedent provides that contract terms with two potential meanings are

ambiguous. (Please see accompanying Memorandum of Law at Paragraph 3. Please also see Brief for Plaintiff-Appellant at pp.22 – 28).

9. It is respectfully submitted that this Court misapplied a principle of law in that it affirmed the Supreme Court's decision through application of what it took as the plain language of the agreement (Please see **Exhibit 1**), despite governing precedent precluding application of the plain meaning rule in circumstances where the contractual term in question is ambiguous. (Please see accompanying Memorandum of Law at Paragraph 4. Please also see Reply Brief for Plaintiff-Appellant at p.9).

10. It is respectfully submitted that this Court misapplied a principle of law and overlooked key facts in the case when it affirmed the Supreme Court's decision by stating that Plaintiff-Appellant was not entitled to royalties, as such "an agreement was clearly not contemplated by the plain language of the agreement." (Please see **Exhibit 1**), as governing precedent states that it is the dictionary that should be relied upon when determining the plain meaning according to the plain meaning rule, and the 1997 dictionary defines royalties as income from sales. (Please see accompanying Memorandum of Law at Paragraph 5). In this regard the 1997 dictionary defines royalties as income from sales. (Please also see Reply Brief for Plaintiff-Appellant at p.12).

11. It is respectfully submitted that this Court misapplied a principle of law and overlooked key facts on the case when it affirmed the Supreme Court's decision granting summary judgment.

Such is the case because the burden never shifted to the Plaintiff-Appellant due to the fact that the Defendant-Respondent never met its evidentiary burden on the motion – particularly in light of the fact that Defendant-Respondent failed to take the procedural steps necessary to afford the Plaintiff-Respondent due process by submitting the issue of direct sales for the first time as an improper sur-reply. (Please see Brief for Plaintiff-Appellant at pp.14 & 22, and Reply Brief for Plaintiff-Appellant at pp.1 – 7. Please also see accompanying Memorandum of Law at Paragraph 6).

12. No previous application has been made for the relief herein sought.

WHEREFORE, I respectfully pray that the Court grant reargument of the above-entitled appeal or, in the alternative, grant Plaintiff-Appellant leave to appeal to the Court of Appeals.

Dated: Brooklyn, New York
April 30, 2008

s/ Joshua Hernandez, Esq.
Joshua Hernandez, Esq.

APPENDIX L

SUPREME COURT OF THE SATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

MARK HYNES,
Plaintiff-Appellant,

-against- **Index No.:** 604046/00

SONIDO, INC.,
Defendant-Respondent.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR REARGUMENT OR LEAVE TO APPEAL

---

1. Governing precedents in the State of New York and in the First Department prohibit a court from determining the intent of the parties from the four corners, or from the circumstances under which the agreement was executed, when there is conflicting extrinsic evidence regarding the parties' intent. James v. Jamie Towers Housing Co., Inc., 294 A.D.2d 268, 275, 727 N.Y.S.2d 85, 92 (1st Dep't 2002); State v. R.J. Reynolds Tobacco Co., 304 A.D.2d 379, 761 N.Y.S.2d 596 (1st Dep't 2003); Amusement Business Underwriters, a Div. of Bingham & Bingham, Inc. v. American International Group, Inc., et al., 66 N.Y.2d 878, 880, 489 N.E.2d 729 (1985); Ehrlich v. Abrams Instrument Corp., 385 N.Y.S.2d 299, (1st Dep't

1976); Briarwood Towers 85th Co. v. Guterman, 523 N.Y.S.2d 98 (1st Dep't 1988); Time Warner Entertainment Co., L.P. v. Brustowsky, 634 N.Y.S.2d 82 (1st Dep't 1995); Steckler v. Steckler, 433 N.Y.S.2d 127 (1st Dep't 1980); Tri-State Pipe Lines Corp. v. Sinclair Refining Co., 264 N.Y.S.2d 138 (1st Dep't 1965).

2. Governing precedents in the State of New York and in the First Department prohibit a court from dismissing a complaint if there is any cognizable claim that is capable of being gleaned from the four corners of the complaint. Underpinning & Foundation Constructors v. Chase Manhattan Bank, N.A., 46 N.Y.2d 459, 462, 414 N.Y.S.2d 298, 386 N.E.2d 1319; Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 274-275, 401 N.Y.S.2d 182, 372 N.E.2d 17; Holly v. Pennysaver Corp., 98 A.D.2d 570, 571-572, 471 N.Y.S.2d 611; Foley v. D'Agostino, 21 A.D.2d 60, 65, 248 N.Y.S.2d 121.

3. Governing precedent provides that contract terms with two potential meanings are ambiguous. Greenfield v. Philles Records, Inc., 98 N.Y.2d 562, 570, 750 N.Y.S.2d 565, 570, 780 N.E.2d 166 (2002); Teichman by Teichman v. Community Hosp. of Western Suffolk, 87 N.Y.2d 514, 520, 640 N.Y.S.2d 472, 474, 663 N.E.2d 628, 20 Employee Benefits Cas. (BNA) 1532 (1996).

4. Governing precedent precludes application of the plain meaning rule in circumstances where the contractual term in question is ambiguous. Evans v. Famous Music Corp., 1 N.Y.3d 452, 458, 775 N.Y.s.2d 757, 761, 807 N.E.2d 869 (2004).

5. Governing precedent states that it is the dictionary that should be relied upon when determining the plain and accepted meaning of a term when applying the plain meaning rule. R/S Associates v. New York Job Development Authority, 98 N.Y.2d 29, 33, 744 N.Y.S.2d 358, 360, 771 N.E.2d 240 (2002).

6. To submit an issue for the first time in an improper sur-reply is a violation of due process. Dannasch v. Bifulco, 184 A.D.2d 415, 416-417, 585 N.Y.S.2d 360 (1st Dep't 1992). See also Levitz v. Robbins Music Corp., 17 A.D.2d 801, 801, 232 N.Y.S.2d 769, 770 (1st Dep't 1962); People v. Minota, 137 A.D.2d 837, 525 N.Y.S.2d 300 (2d Dep't 1988), citing State Farm Fire and Cas. Co. v. LiMauro, 103 A.D.2d 514, 481 N.Y.S.2d 90 (2d Dep't 1984), aff'd, 65 N.Y.2d 369, 492 N.Y.S.2d 534, 482 N.E.2d 13 (1985). See also People v. Ford, 69 N.Y.2d 775, 513 N.Y.S.2d 106, 505 N.E.2d 615 (1987).

WHEREFORE, in light of the precedents contained herein, I respectfully pray of the Court that it grant reargument of the above-entitled appeal or, in the alternative, grant Plaintiff-Appellant leave to appeal to the Court of Appeals.

Dated: Brooklyn, New York
April 30, 2008

Yours, etc.

s/ Joshua Hernandez, Esq.
By: Joshua Hernandez, Esq.
LAW OFFICES OF ANATTA LEVINSKY, P.C.

Attorneys for Plaintiff-Appellant
6924 Bay Parkway
Brooklyn, New York 11204
(718) 837-9700

APPENDIX M

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MARK HYNES,
Plaintiff,

Index No.: 604046/2000

v.

NOTICE OF APPEAL

SONIDO, INC.,
Defendant.

PLEASE TAKE NOTICE that the above-named Plaintiff, pursuant to CPLR 5601(b)(1), appeals to the Court of Appeals from an order of the Appellate Division, First Department, entered in the office of the Clerk of the Appellate Division on April 3, 2008, which order unanimously affirmed the judgment of the Supreme Court entered in the office of the Clerk of New York County on February 5, 2008. The time to take appeal has been extended by operation of CPLR 5514, as the Plaintiff made a motion to the Appellate Division, First Department, for leave to appeal to the Court of Appeals on April 3, 2008, which was denied on June 15, 2008. (The decision denying said order is annexed).

Pursuant to CPLR 5514(a) and CPLR 5513(b), an appeal to the Court of Appeals must be made within thirty (30) days of the Appellate Division's decision denying a motion for leave to appeal to the Court of Appeals to be found timely.

Thus, as the abovementioned order finally determines this action in which there is directly

involved the denial of the of the Plaintiff's right to a trial in a civil case as prescribed in the provisions of Article Seven of the Constitution of the United States of America, and in which there is directly involved the Plaintiff's right to due process as prescribed in the Fourteenth Amendment to the Constitution of the United States of America.

PLEASE TAKE FURTHER NOTICE that the Plaintiff appeals from each and every part of the abovementioned order of the Appellate Division, as well as from the whole order.

PLEASE TAKE FURTHER NOTICE that a simultaneous Motion for Leave to Appeal to the Court of Appeals was made on August 12, 2008.

Dated: Brooklyn, New York
August 12, 2008

Yours, etc.,

s/ Joshua Hernandez, Esq.
By: Joshua Hernandez, Esq., *of Counsel*
LAW OFFICES OF ANATTA LEVINSKY, P.C.
Attorneys for Appellant
6924 Bay Parkway
Brooklyn, New York
(718) 837-9700

To: CLERK OF THE COURT – NEW YORK COUNTY
60 Centre Street
New York, New York 10007

CLERK OF THE COURT OF APPEALS
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207-1095

THE LAW OFFICES OF STUART A. JACKSON, P.C.
Attn: STUART ALAN JACKSON, ESQ.
CHRISTELLE CLEMENT, ESQ., of Counsel
Attorneys for Defendant-Respondent
70 East 55th Street
New York, New York 10022
(212) 755-0500

APPENDIX N

COURT OF APPEALS
STATE OF NEW YORK

MARK HYNES,

Appellant,

v.

SONIDO, INC.,

Respondent.

COUNTY OF KINGS

COUNTY CLERK INDEX NO.: 604046/2000

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE that, upon the annexed statement pursuant to Rules 500.21 and 500.22 of the Court of Appeals Rules of Practice, signed on the 12th day of August, 2008 by Joshua Hernandez, Esq., of counsel to the Law Offices of Anatta Levinsky, P.C., attorneys for the Appellant, the above-captioned Appellant will move this Court, at Court of Appeals Hall, Albany New York on the 25th day of August, 2008, for an order granting leave to appeal to this Court from the order and judgment of the Supreme Court of the State of New York in and for the County of New York, dated February 5, 2007, and from the decision and affirming order of the Appellate Division, First Department, dated April 3, 2008.

Answering papers, if any, must be served and filed in the Court of Appeals with proof of service on or before the date of the motion.

There is no oral argument of motions, and no personal appearances are permitted.

Dated: Brooklyn, New York
August 12, 2008

Yours, etc.

s/ Joshua Hernandez, Esq.
By: Joshua Hernandez, Esq., *of Counsel*
LAW OFFICES OF ANATTA LEVINSKY, P.C.
Attorneys for the Appellant
6924 Bay Parkway
Brooklyn, New York 11204
(718) 837-9700

To: CLERK OF THE COURT OF APPEALS
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207-1095

THE LAW OFFICES OF STUART A. JACKSON, P.C.
Attn: Stuart Alan Jackson, Esq.
Christelle Clement, Esq., *of Counsel*
Attorneys for Respondent
70 East 55th Street
New York, New York 10022
(212) 755-0500

STATEMENT IN SUPPORT OF MOTION PURSUANT TO RULES 500.21 AND 500.22

PROCEDURAL HISTORY AND DEMONSTRATION OF TIMELINESS:

On February 21, 2007, Respondent (then Defendant) Sonido, Inc. served the Appellant (then Plaintiff), Mark Hynes, by regular mail with the judgment and order that the Appellant is seeking leave to appeal from, along with the notice of entry for said judgment and order. The judgment and order was dated and entered February 5, 2007. A copy of such, along with the notice of entry thereto, is annexed hereto as "Exhibit 1."

An appeal was thereafter taken from said order and judgment on March 21, 2007. Annexed hereto as "Exhibit 2" are copies of the notice of appeal, the Preargument Statement, and the affidavit of service thereto.

The Appellate Division unanimously affirmed the aforementioned order and judgment of the Supreme Court on April 3, 2008, and the Appellant was served with such, as well as the notice of entry thereto, on April 14, 2008. Annexed hereto as "Exhibit 3" are copies of the affirming order and the notice of entry.

A motion for leave to appeal to the Court of Appeals was made by the Appellant in the Appellate Division, First Department, in the form of a Motion for Reargument or Leave to Appeal that was served on the Respondent, Sonido, Inc., on May 2, 2008 by regular mail. Annexed hereto as "Exhibit 4" is a copy of said motion, along with the affidavit of service thereto. (Pursuant to CPLR 5514(a), such motion extends the time to move for leave to appeal with the Court of Appeals.)

The Appellate Division denied the Appellant's motion for permission to appeal to the Court of Appeals on June 15, 2008. To date, the Respondent has not served the Appellant with a copy of said decision, or with a notice of entry for such. Though a notice of entry has not been served, pursuant to CPLR 5514(a) and CPLR 5513(b), a motion for leave to appeal to the Court of Appeals must be made within thirty (30) days of the Appellate Division's decision denying leave to appeal to the Court of Appeals to be found timely. Annexed hereto as "Exhibit 5" is a copy of the aforementioned decision denying the Appellant leave to appeal to the Court of Appeals.

On August 12, 2008 the present motion for leave to appeal was served on Respondent. The affidavit of service thereto is annexed as a separate sheet, part of the motion packet, which also contains a copy of the Record on Appeal and a copy of each brief submitted on appeal before the Appellate Division.

An appeal as of right is also being simultaneously being taken. The Notice of Appeal was served on the Respondent on August 12, 2008. The affidavit of service thereto is also annexed separately as part of the motion packet, while a duplicate of the Notice of Appeal is annexed as "Exhibit 6."

QUESTIONS PRESENTED:

QUESTION ONE:

Is it error for a trial court to find that an issue of material fact was raised in the motion papers of both parties but to grant the movant summary judgment nonetheless – in violation of the nonmoving party's

Constitutional rights to a trial by jury and due process?[248]

Question One is preserved for appeal on the record at R.10, R.15, R.22, and R.93, in the Brief for Plaintiff-Appellant at pp.7 – 11 and pp.22-28, in the Reply Brief for Plaintiff appellant at p.16, and in the Affirmation in Support Motion for Reargument or Leave to Appeal to the Court of Appeals at Paragraph 6, which is annexed as "Exhibit 4".

QUESTION TWO:

In an action in which the parties have a contract awarding a percentage of a defendant's earnings to a plaintiff, is it appropriate for a trial court to treat the

---

[248] Governing precedent from the Court of Appeals and in the First Department prohibits a court from deciding a contract as matter of law when extrinsic evidence as to the intent of the parties is presented. Amusement Business Underwriters, a Div. of Bingham & Bingham, Inc. v. American International Group, Inc., et al., 66 N.Y.2d 878, 880, 489 N.E.2d 729 (1985); James v. Jamie Towers Housing Co., Inc., 294 A.D.2d 268, 275, 727 N.Y.S.2d 85, 92 (1st Dep't 2002); State v. R.J. Reynolds Tobacco Co., 304 A.D.2d 379, 761 N.Y.S.2d 596 (1st Dep't 2003); Ehrlich v. Abrams Instrument Corp., 385 N.Y.S.2d 299, (1st Dep't 1976); Briarwood Towers 85th Co. v. Guterman, 523 N.Y.S.2d 98 (1st Dep't 1988); Time Warner Entertainment Co., L.P. v. Brustowsky, 634 N.Y.S.2d 82 (1st Dep't 1995); Steckler v. Steckler, 433 N.Y.S.2d 127 (1st Dep't 1980); Tri-State Pipe Lines Corp. v. Sinclair Refining Co., 264 N.Y.S.2d 138 (1st Dep't 1965).

Authority from other Departments that conflicts with the opinion of the Appellate Division is found in Gallo Painting, Inc. v. Aetna Insurance Co., 49 A.D.2d 746, 372 N.Y.S.2d 699 (2d Dep't 1975); Pellot v. Pellot, 305 A.D.2d 478, 481, 759 N.Y.S.2d 494, 497 (2d Dep't 2003); Stuyvesant Plaza, Inc. v. Emizack LLC., 307 A.D.2d 640, 763 N.Y.S.2d 146 (3d Dep't 2003); Alternatives Federal Credit Union v. Olbios, LLC, 14 A.D.3d 779, 787 N.Y.S.2d 508, 511 (3d Dep't 2005).

issue of no sales being made by the defendant as determinative as a matter of law – although Court of Appeals precedent states the contrary?[249]

Question Two is preserved for appeal on the record at R.9 – 10, R..12, R.15 – 18, R.29 – 30, R.166, R.207 – 208, R.230, R.287 – 288, R.290, R. 300 – 301, and R. 309, in the Brief for Plaintiff-Appellant at pp. 11 – 22, in the Reply Brief for Plaintiff-Appellant at p.9 and pp.20 – 24, and in the Affirmation in Support of Motion for Reargument or Leave to Appeal to the Court of Appeals at Paragraph 7, which is annexed as "Exhibit 4."

QUESTION THREE:

---

[249] Governing precedent from the Court of Appeals and in the First Department prohibits a court from dismissing a complaint if there is any cognizable claim that is capable of being gleaned from the four corners of the complaint. Underpinning & Foundation Constructors v. Chase Manhattan Bank, N.A., 46 N.Y.2d 459, 462, 414 N.Y.S.2d 298, 386 N.E.2d 1319 (1979); Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 274-275, 401 N.Y.S.2d 182, 372 N.E.2d 17 (1977); Foley v. D'Agostino, 21 A.D.2d 60, 65, 248 N.Y.S.2d 121(1st Dep't 1964).

Authority from other Departments that conflicts with the opinion of the Appellate Division is found in Holly v. Pennysaver Corp., 98 A.D.2d 570, 571-572, 471 N.Y.S.2d 611(2d Dep't 1984).

With regard to the present case, the Appellant's complaint, as well as a search of the record, reveals causes of action for reliance, repudiation, and breach of the covenant of good-faith and fair dealing. (Please see Brief for Plaintiff-Appellant at pp.11 – 22, and Reply Brief for Plaintiff-Appellant at p.21.) Such causes of action would still be actionable despite the interpretation of the contract affirmed by the Appellate Division. (Please see Brief for Plaintiff-Appellant at pp.11 – 22, and Reply Brief for Plaintiff-Appellant at p.21.) Please also see R.36.

If ambiguity as to the meaning of a term in the contract is raised in the papers opposing a motion for summary judgment, and if the party opposing the motion produces evidence in support of its interpretation of the ambiguous term on said motion, is it appropriate for a trial court to grant with summary judgment – despite Court of Appeals precedent to the contrary?[250]

Question Three is preserved for appeal on the record at R.10 – 11, R.30, R.36 – 37, R.200 – 204, R.206, R.286 – 288, R.290 – 292, R.295 – 297, in the Brief for Plaintiff-Appellant at pp.22 – 28, in the Reply Brief for Plaintiff-Appellant at pp.8 – 9, p.19, and p. 21, and in the Affirmation is Support of Motion for Reargument or Leave to Appeal to the Court of Appeals at Paragraph 8, which is annexed as "Exhibit 4."

QUESTION FOUR:

If a search of the record, as well as a search of the papers for and against the motion, reveal facts supporting a claim that the moving party breached the contract by repudiation (and by breach of said party's duties of good faith, fair dealing, and best efforts), is it appropriate for a trial court to grant summary judgment on the issue of breach of contract

---

[250] Governing precedent precludes application of a legal determination of the meaning of a disputed term in circumstances where the contractual term in question is ambiguous. Evans v. Famous Music Corp., 1 N.Y.3d 452, 458, 775 N.Y.s.2d 757, 761, 807 N.E.2d 869 (2004).

Authority from other Departments that conflicts with the opinion of the Appellate Division is found in Weiss v. Garfield, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dep't 1964).

in favor of the moving party – despite conflicting Court of Appeals precedent?[251]

Question Four is preserved for appeal on the record at R.36, R.166, R.207 – 208, R. 227, R.230, and R.300 – 301, in the Brief for Plaintiff-Appellant at pp.11 – 22, in the Reply Brief for Plaintiff-Appellant at p.21, and in the Affirmation in Support of Motion for Reargument or Leave to Appeal to the Court of Appeals at Paragraph 7, which is annexed as "Exhibit 4."

QUESTION FIVE:

Is it improper for a trial court sitting in the First Department to interpret a contract in a way that runs contrary to First Department and Court of Appeals precedent regarding the rules of contractual construction?

Question Five is preserved for appeal on the record at R.11 – 30, R.36 – 38, R.74, R. 200 – 204, R.206, R.240, R.286 – 288, and R.296 - 297, in the Brief for Plaintiff-Appellant at pp.35 – 46, and in the Reply Brief for Plaintiff-Appellant at pp. 13 - 19.

---

[251] Governing precedent from the Court of Appeals and in the First Department prohibits a court from dismissing a complaint if there is any cognizable claim that is capable of being gleaned from the four corners of the complaint. Underpinning & Foundation Constructors v. Chase Manhattan Bank, N.A., 46 N.Y.2d 459, 462, 414 N.Y.S.2d 298, 386 N.E.2d 1319 (1979); Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 274-275, 401 N.Y.S.2d 182, 372 N.E.2d 17 (1977); Foley v. D'Agostino, 21 A.D.2d 60, 65, 248 N.Y.S.2d 121(1st Dep't 1964).

Authority from other Departments that conflicts with the opinion of the Appellate Division is found in Holly v. Pennysaver Corp., 98 A.D.2d 570, 571-572, 471 N.Y.S.2d 611 (2d Dep't 1984).

QUESTION SIX:

Did the Appellate Division commit error when it affirmed the Supreme Court's decision "upon an examination of the intent of the parties within the four corners of the agreement, as well as the circumstances under which [the contract] was executed"[252] when it did so contrary to the governing precedent of this Court that prohibits a court from determining the intent of the parties from the four corners, or from the circumstances under which the agreement was executed, when there is conflicting extrinsic evidence regarding the parties' intent?[253]

Question Six is preserved for appeal on the record at R.36, R.286 – 288, and R.295 – 296, in the Brief

---

[252] Please see "Exhibit 3".

[253] Governing precedent from the Court of Appeals and in the First Department prohibits a court from determining the intent of the parties from the four corners, or from the circumstances under which the agreement was executed, when there is conflicting extrinsic evidence regarding the parties' intent. Amusement Business Underwriters, a Div. of Bingham & Bingham, Inc. v. American International Group, Inc., et al., 66 N.Y.2d 878, 880, 489 N.E.2d 729 (1985); James v. Jamie Towers Housing Co., Inc., 294 A.D.2d 268, 275, 727 N.Y.S.2d 85, 92 (1st Dep't 2002); State v. R.J. Reynolds Tobacco Co., 304 A.D.2d 379, 761 N.Y.S.2d 596 (1st Dep't 2003); Ehrlich v. Abrams Instrument Corp., 385 N.Y.S.2d 299, (1st Dep't 1976); Briarwood Towers 85th Co. v. Guterman, 523 N.Y.S.2d 98 (1st Dep't 1988); Time Warner Entertainment Co., L.P. v. Brustowsky, 634 N.Y.S.2d 82 (1st Dep't 1995); Steckler v. Steckler, 433 N.Y.S.2d 127 (1st Dep't 1980); Tri-State Pipe Lines Corp. v. Sinclair Refining Co., 264 N.Y.S.2d 138 (1st Dep't 1965).

Authority from other Departments that conflicts with the opinion of the Appellate Division is found in CV Holdings, LLC v. Artisan Advisors, LLC, 835 N.Y.S.2d 778, 779, 40 A.D.3d 1322, 1323, 2007 N.Y. Slip Op. 04377, 04377 (3d Dep't 2007).

for Plaintiff-Appellant at pp.22 – 28, in the Reply Brief for Plaintiff-Appellant at p.9, and p.16, in the Affirmation in Support of Motion for Reargument or Leave to Appeal to the Court of Appeals at Paragraph 6, which is annexed as "Exhibit 4", and on the face of the decision and order of the Appellate Division, dated April 3, 2008, annexed as "Exhibit 3."

QUESTION SEVEN:

Did the Appellate Division commit error when it affirmed the Supreme Court's decision dismissing the Appellant's Complaint on the grounds that the Appellant allegedly sustained no damages – despite governing precedent of this Court which prohibits a court from dismissing a complaint if there is any cognizable claim that can be gleaned from the four corners of the complaint?[254]

---

[254] Governing precedent from the Court of Appeals and in the First Department prohibits a court from dismissing a complaint if there is any cognizable claim that is capable of being gleaned from the four corners of the complaint. Underpinning & Foundation Constructors v. Chase Manhattan Bank, N.A., 46 N.Y.2d 459, 462, 414 N.Y.S.2d 298, 386 N.E.2d 1319 (1979); Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 274-275, 401 N.Y.S.2d 182, 372 N.E.2d 17 (1977); Foley v. D'Agostino, 21 A.D.2d 60, 65, 248 N.Y.S.2d 121(1st Dep't 1964).

Authority from other Departments that conflicts with the opinion of the Appellate Division is found in Holly v. Pennysaver Corp., 98 A.D.2d 570, 571-572, 471 N.Y.S.2d 611(2d Dep't 1984).

With regard to the present case, the Appellant's complaint, as well as a search of the record, reveals causes of action for reliance, repudiation, and breach of the covenant of good-faith and fair dealing. (Please see Brief for Plaintiff-Appellant at pp.11 – 22, and Reply Brief for Plaintiff-Appellant at p.21.) Such causes of action would still be actionable despite the interpretation of the contract affirmed by the Appellate Division. (Please see Brief for Plaintiff-Appellant at pp.11 – 22,

Question Seven is preserved for appeal on the record at R.36, in the Brief for Plaintiff-Appellant at pp.11 – 22, in the Reply Brief for Plaintiff-Appellant at p.21, and in the Affirmation in Support of Motion for Reargument or Leave to Appeal to the Court of Appeals at Paragraph 7, which is annexed as "Exhibit 4."

QUESTION EIGHT:

Did the Appellate Division commit error when it affirmed the Supreme Court's decision based upon its finding that "the relevant contract term – '10% of all income from sales made by the internet' – is unambiguous,"[255] despite conflicting governing precedent which provides that contract terms with two potential meanings are as a matter of law ambiguous?[256]

Question Eight is preserved for appeal on the record at R. 11, R.30, R.36, R.286 – 288, and R.295 – 296, in the Brief for Plaintiff-Appellant at pp.22 – 28, in the Reply Brief for Plaintiff-Appellant at p.3, in the Affirmation in Support of Motion for Reargument

---

and Reply Brief for Plaintiff-Appellant at p.21.) Please also see R.36.

[255] Please see "Exhibit 3".

[256] Governing precedent provides that contract terms with two potential meanings are ambiguous. Greenfield v. Philles Records, Inc., 98 N.Y.2d 562, 570, 750 N.Y.S.2d 565, 570, 780 N.E.2d 166 (2002); Teichman by Teichman v. Community Hosp. of Western Suffolk, 87 N.Y.2d 514, 520, 640 N.Y.S.2d 472, 474, 663 N.E.2d 628, 20 Employee Benefits Cas. (BNA) 1532 (1996).

Authority from other Departments that conflicts with the opinion of the Appellate Division is found Computer Associates Intern., Inc. v. U.S. Balloon Mfg. Co., Inc., 782 N.Y.S.2d 117, 118+, 10 A.D.3d 699, 699+, 2004 N.Y. Slip Op. 06741, 06741+ (2d Dep't 2004).

or Leave to Appeal to the Court of Appeals at Paragraph 8, which is annexed as "Exhibit 4," and on the face of the decision and order of the Appellate Division, dated April 3, 2008, annexed as "Exhibit 3."

QUESTION NINE:

Did the Appellate Division commit error when it affirmed the Supreme Court's decision through application of what it took as the plain meaning of the agreement[257] despite governing precedent of the Court of Appeals precluding application of the plain meaning rule in circumstances where the contractual term in question is ambiguous?[258]

Question Nine is preserved for appeal on the record at R.289 – 293, and R. 296, in the Brief for Plaintiff-Appellant at p.23 and p.28, in the Reply Brief for Plaintiff-Appellant at p.9, in the Affirmation in Support of Motion for Reargument or Leave to Appeal to the Court of Appeals at Paragraph 9, which is annexed as "Exhibit 4," and on the face of the decision and order of the Appellate Division, dated April 3, 2008, annexed as "Exhibit 3."

QUESTION TEN:

Did the Appellate Division commit error when it affirmed the Supreme Court's decision by stating that the Appellant was not entitled to royalties, as such "an agreement was clearly not contemplated by the plain language of the agreement"[259] — *despite*

---

[257] Please see "Exhibit 3".

[258] Governing precedent precludes application of the plain meaning rule in circumstances where the contractual term in question is ambiguous. Evans v. Famous Music Corp., 1 N.Y.3d 452, 458, 775 N.Y.s.2d 757, 761, 807 N.E.2d 869 (2004).

[259] Please see "Exhibit 3".

governing precedent of this Court which states that it is the dictionary that should be relied upon when determining the plain meaning of a term in accordance with the plain meaning rule, and the only dictionary definition before the Appellate Division defined the term "royalty" as "payment made...for each copy of a work or article sold"?[260]

Question Ten is preserved for appeal on the record at R.289 – 293, and R. 296, in the Brief for Plaintiff-Appellant at p.23 and p.28, in the Reply Brief for Plaintiff-Appellant at pp.9 – 12, and p.17 in the Affirmation in Support of Motion for Reargument or Leave to Appeal to the Court of Appeals at Paragraph 10, which is annexed as "Exhibit 4," and on the face of the decision and order of the Appellate Division, dated April 3, 2008, annexed as "Exhibit 3."

QUESTION ELEVEN:

Did the Appellate Division commit error when it affirmed the Supreme Court's decision granting summary judgment despite the burden never shifting to the Appellant because the Respondent never met its evidentiary burden on the motion – particularly in light of the fact that the Respondent failed to take the procedural steps necessary to afford the Appellant due process when it improperly introduced

---

[260] The Court of Appeals has ruled that it is the dictionary that should be relied upon when determining the plain and accepted meaning of a term when applying the plain meaning rule. R/S Associates v. New York Job Development Authority, 98 N.Y.2d 29, 33, 744 N.Y.S.2d 358, 360, 771 N.E.2d 240 (2002). The dictionary definition in question comes from BLACKS LAW DICTIONARY 1356 (Bryan A. Garner, ed. 2004), and was before the Appellate Division in the Reply Brief for Plaintiff-Appellant at p.17, Footnote 56.

the issue of direct sales for the first time in its reply papers to the original motion?[261]

Question Eleven is preserved on the record at R.37, R. 296, in the Brief for Plaintiff-Appellant at pp.14 and 22 – 23, in the Reply Brief for Plaintiff-Appellant at pp.1 – 7 (particularly Footnote 15 on p.4), and in the Affirmation in Support of Motion for Reargument or Leave to Appeal to the Court of Appeals at Paragraph 11, which is annexed as "Exhibit 4."

The above are not an express limitation of the questions brought on appeal.

JURISDICTION:

Pursuant to CPLR 5602(a)(1)(i), a litigant is allowed to seek leave to appeal from a final Appellate Division order entered in an action originating in the

---

[261] To submit an issue for the first time in the reply papers is a violation of due process. People v. Minota, 137 A.D.2d 837, 525 N.Y.S.2d 300 (2d Dep't 1988), citing State Farm Fire and Cas. Co. v. LiMauro, 103 A.D.2d 514, 481 N.Y.S.2d 90 (2d Dep't 1984), aff'd, 65 N.Y.2d 369, 492 N.Y.S.2d 534, 482 N.E.2d 13 (1985). See also People v. Ford, 69 N.Y.2d 775, 513 N.Y.S.2d 106, 505 N.E.2d 615 (1987); Dannasch v. Bifulco, 184 A.D.2d 415, 416-417, 585 N.Y.S.2d 360 (1st Dep't 1992); Levitz v. Robbins Music Corp., 17 A.D.2d 801, 801, 232 N.Y.S.2d 769, 770 (1st Dep't 1962). This coincides with the general rule cited in the authorities at Footnote 1, *supra*, which states that courts are precluded from deciding a contract as a matter of law when extrinsic evidence as to the intent of the parties is presented. Please also note Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (a 1986 determination of the U.S. Supreme Court suggesting that the resisting party need not come forward with proof to sustain its claim until the moving party has demonstrated that some basic element missing from the claim).

Supreme Court. The present action is such an action, as stated in the paragraph concerning "Procedural History and Demonstration of Timeliness", *supra*.

ARGUMENT AS TO WHY THE COURT OF APPEALS SHOULD GRANT THE MOTION:

1. ISSUES OF STATEWIDE IMPORTANCE:

A. CONFUSION AND CONFLICT IN THE LAW OF THE STATE OF NEW YORK:

As listed in the footnotes to the "Questions Presented" section, *supra*, the Opinion of the Appellate Division, First Department, and the Opinion of the Supreme Court, which it affirms, both conflict with Court of Appeals precedent on a number of points which have been clearly settled by this Court,[262] as well as precedent set by the other Departments.[263] The Opinion of the Appellate Division also conflicts on its face with previous First Department Appellate Division precedent[264] – though it does not appear to overrule it, which is sure to cause confusion. Key points of direct conflict with Court of Appeals precedent that can be seen on the face of the opinion are: (1) that the Opinion supports the proposition that a court may determine the intent of the parties from the four corners, or

---

[262] Please refer to the authorities cited in the footnotes to the "Questions Presented" section, *supra*.

[263] Please refer to the authorities cited in the second paragraphs to the footnotes to Questions One, Two, Three, Four, Six, Seven, and Eight, *supra*.

[264] Please refer to the authorities cited in the footnotes to the "Questions Presented" section, *supra*.

from the circumstances under which the agreement was executed – despite conflicting extrinsic evidence regarding the parties' intent;[265] (2) that the Opinion supports the proposition that a court may determine that a term is not ambiguous despite two meanings for a disputed being presented by both parties;[266] and, (3) that the Opinion supports the proposition that a court may apply the Plain Meaning Rule despite an ambiguity (two meaning of the disputed term) being before said court.[267]

Aside from the abovementioned conflicts with Court of Appeals precedent that are apparent on the face of the opinion, the Appellate Division's ruling also conflicts directly (for anyone who can demonstrate the procedural history of the case) with many other holdings of this Court, as demonstrated in the footnotes to the "Questions Presented" section, *supra*. This conflict is unnecessary – and not nuanced in any way – as the Opinion of the Appellate Division runs contrary to well established holdings that concern the protection of parties' Constitutional rights trial and due process[268] (and apparently involves misapplication of principles of law cited in those authorities). As it runs contrary, the opinion cannot be reconciled with those precedents, and should not therefore be left within the body of New York law to be used by trial courts in their determination of future matters. The trial courts would essentially be bound to consider this most-recent decision by the Appellate Division, and given the great pressures for expediency in litigation, as

---

[265] Please see Question Six, *supra*, and "Exhibit 3".

[266] Please see Question Eight, *supra*, and "Exhibit 3".

[267] Please see Question Nine, *supra*, and "Exhibit 3".

[268] Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

well as for the clearing of dockets, the Appellate Division's ruling holds an unreasonable potential for abuse of future parties' Constitutional rights to trial and due process (particularly in light of the fact that the opinion clearly runs contrary to well-established precedents set to protect those rights).[269]

This unreasonable risk of injustice is magnified when it is noted that the Appellate Division sits in the First Department, which contains New York County – quite arguably the financial center of the United States.

B. IMPLICATIONS FOR STATEWIDE AND GLOBAL INTERNET COMMERCE:

On its face, the Appellate Division's ruling appears to judicially determine that the term "income from Internet sales" does not refer to royalties. This not only conflicts with the usage within the trade – in which "income from Internet sales" almost invariably refers to income from sales made through arrangements utilizing royalties,[270] but also conflicts with the common understandings (as listed in the dictionary) of the terms "Internet", "WebPage", "World Wide Web", "Internet Payment", "Cyberpayment", and "Royalty".[271] The decision of the Appellate Division therefore conflicts with not only the use of these terms within the particular trade that deals with them (i.e. Internet commerce),

---

[269] Please refer to the authorities cited in the footnotes to the "Questions Presented" section, *supra*.

[270] Please see record at R.289 – 293, Brief for Plaintiff-Appellant at pp.22 – 23 (particularly Footnote 57), and Reply Brief for Plaintiff-Appellant at p.12.

[271] Please see Reply Brief for Plaintiff-Appellant at pp.12 and 17.

but also with the common understandings of the terms. When this is considered with the fact that the Respondent never introduced any evidence as to the meaning of the terms in question,[272] it becomes greatly important to correct this judicial determination disfavoring and restricting the common and trade uses of such a prolific term within Internet commerce. Furthermore, as no other evidence of the terms in question was before any of the preceding courts,[273] there appears to be no basis for the determination of the Appellate Division. The definition of the term "income from Internet sales" in contracts, which is crucial to burgeoning and stable electronic commerce, should not be construed contrary to industry custom, the plain meaning of the term as listed in the dictionary, and without a basis in evidence. Consequently, it is dangerous to allow the published opinion of the Appellate Division to stand in its present state – particularly in light of the fact that it conflicts with so many prior Court of Appeals holdings.[274]

2. THE RULING VIOLATES THE APPELLANT'S CONSTITUTIONAL RIGHTS:

A. VIOLATION OF SEVENTH AMENDMENT RIGHT TO A TRIAL BY JURY IN CIVIL CASES:

By affirming the decision of a trial court, which decided the case in question as a matter of law

---

[272] Please see Brief for Plaintiff-Appellant at pp.22 – 23 (particularly Footnote 57).

[273] Please see Brief for Plaintiff-Appellant at pp.22 – 23 (particularly Footnote 57).

[274] Please refer to the authorities cited in the footnotes to the "Questions Presented" section, *supra*.

despite issues of fact being present on the record,[275] the Appellant was denied his right to a trial by jury in a civil case.[276]

B. VIOLATION OF PROCEDURAL AND SUBSTANTIVE DUE PROCESS:

By affirming the decision of a trial court, which granted summary judgment despite the moving party failing to meet its burden (and where the issues in question were raised for the first time inappropriately in the moving party's reply papers),[277] the Appellant was denied his Constitutional right to due process.[278]

DISCLOSURE PURSUANT TO 22 NYCR 500.1[C] AND 22 NYCR 500.22[B][5]:

The Appellant is a natural person and not a corporation or other business entity. Consequently, the Appellant is not required to make a disclosure listing all parents, subsidiaries, and affiliates.

CONCLUSION:

---

[275] Please refer to Questions One, Two, Four, and Six in the "Questions Presented" section, *supra*.

[276] Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Please also refer to the authorities cited in the footnotes to Questions Six, Seven, Nine, and Ten in the "Questions Presented" section, *supra*.

[277] Please see Question Eleven in the "Questions Presented" section, *Supra*.

[278] Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Please also refer to the authorities cited in the footnote to Questions Eleven in the "Questions Presented" section, *supra*.

As the affirming opinion of the Appellate Division, as well as the original order and judgment of the Supreme Court, which it affirms, violate clear Court of Appeals precedent, violate clear Appellate Division precedent, conflict with clear precedents in the other Departments, pose an unreasonable danger of promoting abuse in Internet commerce via a rule that does not conform to the uses within said trade, and violate the Appellant's Constitutional rights to a trial by jury and due process, it is respectfully requested of this Court that it reverse the decisions of the Appellate Division and Supreme Court, that it issue an order in conformity with the great body of law opposing the Appellate Division's decision, and that it grant the Appellant such other and further relief as to this Court seems just and proper.

No previous application has been made for the relief sought herein.

An appeal as of right is also simultaneously being taken, as stated at the end of the "Questions Presented" paragraph, *supra*.

Dated: Brooklyn, New York
August 12, 2008

Respectfully submitted,

s/ Joshua Hernandez, Esq.
By: Joshua Hernandez, Esq., *of Counsel*
LAW OFFICES OF ANATTA LEVINSKY, P.C.
Attorneys for Appellant
6924 Bay Parkway
Brooklyn, New York
(718) 837-9700

To: CLERK OF THE COURT OF APPEALS
Court of Appeals Hall

20 Eagle Street
Albany, New York 12207-1095

THE LAW OFFICES OF STUART A. JACKSON, P.C.
Attn: Stuart Alan Jackson, Esq.
Christelle Clement, Esq., *of Counsel*
Attorneys for Defendant-Respondent
70 East 55th Street
New York, New York 10022
(212) 755-0500

APPENDIX O

COURT OF APPEALS STATE OF NEW YORK

MARK HYNES,
Appellant,
-against-

SONIDO, INC.,
Respondent.

ON APPEAL FROM THE APPELLATE DIVISION,
FIRST DEPARTMENT.
FIRST DEPARTMENT APPEAL NO.: 3249

ORIGINALLY BEFORE THE SUPREME COURT,
NEW YORK COUNTY.
NEW YORK COUNTY INDEX NO.: 604046

COMMENTS CONCERNING
SUBJECT MATTER JURISDICTION

MOTION NO.: 1005

Joshua Hernandez, Esq., *of Counsel*
LAW OFFICES OF ANATTA LEVINSKY, P.C.
Attorneys for Appellant
6924 Bay Parkway
Brooklyn, New York 11204
Telephone Number: (718) 837-9700
Facsimile Number: (718) 837-5555

A Concise Summary of Appellant's Comments Concerning Subject Matter Jurisdiction

Comment One – First Issue:

A substantial Constitutional question is directly involved in the present appeal, as the question of an issue of fact disallowing summary judgment is itself a question that is framed by, and directly linked to, the Constitutionally guaranteed right to trial by jury.

Aside from the mistrust of government present in the Constitution of the United States, and the Constitution of the State of New York, nothing else is as synonymous with the function of a jury – legally speaking – as the concept of an issue of fact.

Comment Two – Second Issue:

The question of an issue of fact being decided by a judge and not a jury was preserved for appeal on the transcript to the original hearing, and was made the preeminent and primary issue of the Appellant's appeal to the Appellate Division in and for the First Department. Nonetheless, the Appellate Division took note of this Constitutional question, but stated that the question, along with the other points raised on appeal, was considered "unavailing."

Comment Three – Third Issue:

Due process of law is guaranteed by both the United States Constitution and State of New York Constitution, and it is well established that the subject matter jurisdiction of the Court of Appeals extends to cases involving a question of whether the judgment attained is the result of due process. In this vein, the question of due process directly

involves the right of the person affected by litigation to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears on the matter involved. It is thus a guaranty that no question of fact or liability shall be conclusively presumed against said individual.

COMMENT FOUR – FOURTH ISSUE:

The issue of whether the contract that is the subject of the present litigation should be limited to sales made over Respondent's website directly by the Respondent (as opposed to all Internet sales) was not raised in Respondent's original motion papers, but instead, for the first time in its reply papers – affording the Appellant no opportunity of controverting by proof a material fact with bearing on the question in the matter involved.

Furthermore, at the hearing that followed, the scope was narrowly determined by the Trial Court Judge in a manner that prevented the Appellant from controverting the issue, and the Appellant was further prevented by the Trial Court Judge from controverting, by testimony, the Trial Court Judge's determination that the contract did not apply to "all Internet sales" – which remains a fundamental issue in the present case. In such manner the Appellant's Constitutional right to due process was violated.

COMMENT FIVE – FIFTH ISSUE:

The issue of due process was preserved on the transcript to the original hearing, as the record indicates that the issue of whether the contract in question refers only to direct sales over Respondent's website was not raised before the reply papers, and because the record indicates that the Trial Court

Judge prevented the Appellant from presenting evidence in favor of a reading of the contract that referred to "all Internet sales." Furthermore, this issue was raised in the Brief for Plaintiff-Appellant that was before the Appellate Division, and was made a primary issue (and thus a substantial issue) in the Appellant's appeal to the Appellate Division in and for the First Department. Nonetheless, the Appellate Division took note of this Constitutional question, but stated that this question, along with the other points raised on appeal, was "unavailing."

ARGUMENT IN SUPPORT OF COMMENTS

FIRST ISSUE:
A SUBSTANTIAL CONSTITUTIONAL QUESTION IS DIRECTLY INVOLVED IN THE PRESENT APPEAL, AS THE QUESTION OF AN ISSUE OF FACT DISALLOWING SUMMARY JUDGMENT IS A QUESTION DIRECTLY LINKED TO THE CONSTITUTIONAL RIGHT TO TRIAL BY JURY

THE CONSTITUTIONAL NATURE OF AN ISSUE OF FACT:

The right to trial by jury is intricately linked to the presence of an issue of fact,[279] and the failure to permit a matter to go to a jury when a material issue of fact is before a court is a violation of a party's Constitutional right to a trial by jury.[280] The very importance of the concept of an issue of fact is due to

---

[279] A litigant is entitled to jury trial, if single issue is created by pleadings. Closson v. Seaboard Sand & Gravel Corp., 238 A.D. 584, 586, 265 N.Y.S. 160, 162 (1st Dep't 1933).

[280] See *id.* Also, the right to a jury trial is a substantial Constitutional right not within the discretion of a judge. Schenck v. Prudential Ins. Co. of America, 167 Misc. 282, 283, 3 N.Y.S.2d 856, 858 (Sup. Ct., 1938); Civil Practice Act, §§ 96, 425, subd. 1; N.Y. Const. art. 1, § 2.

its relationship to the function of a jury (i.e. the determination of issues of fact), and it is for that reason that a party's entitlement to a jury trial is dependent upon the facts pleaded, and not the demand for relief.[281] Likewise, the very phrase "otherwise triable by jury" as used in CPLR 2218 is in direct reference to (and thus legislatively defined and determined in terms of) the circumstance in which an issue of fact arises upon a motion.[282] Furthermore, the very purpose of the aforementioned provision of the CPLR, detailing the use of a jury on motion to dismiss, is to protect the Constitutional right to a jury trial.[283]

Finally, and more succinctly, the CPLR directly defines the right to a trial directly in terms of the concept of an issue of fact, as CPLR 4101(1) provides that "issues of fact ... [in] an action in which a party demands and sets forth facts which would permit a judgment for a sum of money ..." are triable to a jury.[284]

THE RIGHT TO A TRIAL BY JURY AS GUARANTEED BY THE CONSTITUTION OF THE STATE OF NEW YORK AND

---

[281] Magill v. Dutchess Bank and Trust Co., 541 N.Y.S.2d 437, (2d Dep't 1989); McKinney's CPLR 4101, subd. 1; Ketcham v. Wilbur, 218 A.D. 350, 351, 218 N.Y.S. 254, 256 (4th Dep't 1926); Lillianfeld v. Lichtenstein, 181 Misc.2d 571, 572, 694 N.Y.S.2d 600, 602, 1999 N.Y. Slip Op. 99352 (Sup. Ct., 1999); In re Johnson's Will, 46 Misc.2d 285, 287, 258 N.Y.S.2d 892, 895 (Sur., 1965).

[282] Marable v. Robinson, 102 Misc.2d 96, 99, 422, N.Y.S.2d 630, 633 (N.Y. City. Civ., 1979); Ives v. South Buffalo Ry. Co., 201 N.Y. 271, 291, 94 N.E. 431, 438, 34 L.R.A.N.S. 162, Am. Ann. Cas. 1912B, 156 (1911).

[283] *Id.* at 100 and 633.

[284] Matter of DES Market Share Litigation, 79 N.Y.2d 299, 305, 591 N.E.2d 226, 229 (1992); N.Y. Const. Art. 1, § 2; CPLR 4101; CPLR 4101(1).

AS PRESERVED BY THE CONSTITUTION OF THE UNITED STATES OF AMERICA:

The right to a jury trial, preserved by Seventh Amendment of United States Constitution, is guaranteed by New York Constitution.[285] The right to jury trial guaranteed under State Constitution extends to the types of cases that are analogous to those traditionally tried by jury,[286] and thus cases for damages where an issue of material fact arises.[287] The right applies to contract actions, such as the present action, as creditors alleging fraudulent conveyance and breach of contract claims against debtors had right to make jury demand because their claims were primarily legal in nature and creditors, under the facts alleged, could obtain full relief by means of a monetary award.[288]

With specific regard to the issue of ambiguity in contract action (when there exists an issue of fact regarding whether a term or clause in said contract is ambiguous, or regarding whether a determination of parties' intent depends upon the credibility of extrinsic evidence, or if a choice can be made among competing inferences to be drawn from extrinsic

---

[285] Fedoryszyn v. Weiss, 62 Misc.2d 889, 891, 310 N.Y.S.2d 55, 58 ( ); U.S. Const. Amend. 7; N.Y. Const. art. 1, § 2.

[286] Matter of DES Market Share Litigation, 79 N.Y.2d 299, 305, 591 N.E.2d 226, 229 (1992); N.Y. Const. Art. 1, § 2; CPLR 4101; CPLR 4101(1).

[287] See *id.* It should be noted, however, that the existence in the complaint of a request for equitable relief does not destroy right to trial by jury where judgment for sum of money is sought. Fedoryszyn v. Weiss, 62 Misc.2d 889, 891, 310 N.Y.S.2d 55, 58 (N.Y. Sup. Ct. 1970); Vinlis Construction Co., Inc., et al. v. Roreck, 23 A.D.2d 895, 896, 260 N.Y.S.2d 245, 247 (2d Dep't 1989).

[288] Miller v. Doniger, 293 A.D.2d 282, 282, 742 N.Y.S.2d 191, 193 (1st Dep't 2002).

evidence), then such must be decided by a trier of fact.[289] Indeed, the law requires that when a contract is deemed ambiguous, extrinsic evidence is not only admissible, but the resolution of the ambiguity itself becomes a fact issue which precludes summary judgment.[290]

Furthermore, the Constitution of the State of New York, at Article 1, Section 1, provides that no person shall be deprived of any of her rights except by the law of the land or judgment of her peers (a statement that highlights the distinction between issues of fact and issues of law, further associating the function of a jury with the concept of the issue of fact),[291] whereas, Article 1, Section 6 of the Constitution of the State of New York provides that no persona shall be deprived of her liberty without due process of law,[292] clearly depicting a relationship between due process of law, fundamental rights, and the right to a trial by jury.[293] Such declarations in the Constitution of the State of New York, however, are not the sources of the rights associated with such declarations, but instead are seen as constituting a shield against unwarranted interference with such

---

[289] Amusement Business Underwriters, a Div. of Bingham & Bingham, Inc. v. American International Group, Inc., et al., 66 N.Y.2d 878, 880, 880-881, 489 N.E.2d 729, 732, 498 N.Y.S.2d 760, 763 (1985); Ehrlich v. Abrams Instrument Corp., 53 A.D.2d 825 825-826, 385 N.Y.S.2d 299, 301 (1st Dep't 1976); Briarwood Towers 85th Co. v. Guterman, 136 A.D.2d 456, 458, 523 N.Y.S.2d 98, 101 (1st Dep't 1988).

[290] Pellot v. Pellot, 305 A.D.2d 478, 481, 759 N.Y.S.2d 494, 497 (1st Dep't 2003).

[291] Gow v. Bingham, 57 Misc. 66, 107 N.Y.S. 1011, 1014 (N.Y. Sup. Ct.,1907); N.Y. Cont. art. 1, § 1.

[292] Gow v. Bingham, 57 Misc. 66, 107 N.Y.S. 1011, 1014 (Sup. Ct., 1907); N.Y. Cont. art. 1, § 6.

[293] People ex rel. Rohrlich v. Follette, 229 N.E.2d 419 (N.Y. 1967).

right by any department of the government, whether executive, legislative, or judicial.[294] There is thus a clear relationship between the natural and fundamental rights of trial by jury and due process as preserved by the Constitution of the United States and those same rights as guaranteed by the Constitution of the State of New York.[295] Due to this interrelation of Constitutional questions, the question of the right to trial by jury (though it is Constitutional in its own right) is also a question of

---

[294] Gow v. Bingham, 57 Misc. 66, 107 N.Y.S. 1011, 1014 (Sup. Ct., 1907). Please also note Ives v. South Buffalo Ry. Co., 201 N.Y. 271, 292, 94 N.E. 431, 439, 34 L.R.A.N.S. 162, Am. Ann. Cas. 1912B, 156 (1911), where the Court of Appeals stated the following with specific regard to this question: "... the fourteenth amendment to the federal Constitution and under section 6, art. 1 of our state Constitution, which guarantee all persons against deprivation of life, liberty, or property without due process of law. We shall not stop to dwell at length upon definitions of 'life,' 'liberty,' 'property,' and 'due process of law.' They are simple and comprehensive in themselves, and have been so often judicially defined that there can be no misunderstanding as to their meaning. 'Process of law' in its broad sense means law in its regular course of administration through courts of justice, and that is but another way of saying that every man's right to life, liberty, and property is to be disposed of in accordance with those ancient and fundamental principles which were in existence when our Constitutions were adopted. 'Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property in its most comprehensive sense, to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears upon the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him this is not due process of law.' Ziegler v. S. & N. Ala. R. R. Co., 58 Ala. 594."

[295] See *id.* Also see, Fedoryszyn v. Weiss, 62 Misc.2d 889, 891, 310 N.Y.S.2d 55, 58 (Sup. Ct. 1970); U.S. Const. Amend. 7; N.Y. Const. art. 1, § 2.

due process, and as such falls readily within the subject matter jurisdiction of the Court of Appeals.[296]

In consideration of all that has been stated above, it is respectfully submitted to this Honorable Court that there is a substantial Constitutional question in the present appeal.

SECOND ISSUE:
THE QUESTION OF AN ISSUE OF FACT BEING DECIDED BY A JUDGE AND NOT A JURY – IN VIOLATION OF APPELLANT'S RIGHT TO A TRIAL BY JURY – WAS ADEQUATELY PRESERVED FOR APPEAL

The question of a material issue of fact being decided by a judge in violation of Appellant's Constitutional right to trial by jury is preserved for appeal on the record at R.10, R.15, R.22, and R.93; in the Brief for Plaintiff-Appellant at pp.7 – 11 and pp.22-28; and, in the Reply Brief for Plaintiff appellant at p.16. Furthermore, the Constitutional nature of the question was especially noted in the Brief for Plaintiff-Appellant at p.10. In addition, the very Trial Court Judge who granted the Respondent's motion for summary judgment stated on the record that there was an issue of fact, and that he would attempt to determine that issue on hearing.[297] When this is coupled by the fact that a judge, on a motion for summary judgment, is required to look at the pleadings when determining if there is an issue of fact,[298] and when it is noted that

---

[296] Valz v. Sheepshead Bay Bungalow Corporation, 249 N.Y. 122, 127, 163 N.E. 124, 132 (1928).

[297] R. 10.

[298] Closson v. Seaboard Sand & Gravel Corp., 238 A.D. 584, 586, 265 N.Y.S. 160, 162 (1st Dep't 1933); Magill v. Dutchess Bank and Trust Co., 541 N.Y.S.2d 437, (2d Dep't 1989); McKinney's CPLR 4101, subd. 1; Ketcham v. Wilbur, 218 A.D. 350, 351, 218

the Appellant's verified complaint presented evidence controverting the position that the Trial Court judge took on the motion,[299] it is clear that the record preserves the question of the Appellant not being provided due process because of the violation of his right to a trial by jury.

Furthermore, this question was also made the principle question (and thus a substantial question) in Appellant's appeal to the Appellate Division,[300] and, furthermore, received treatment by the Appellate Division in its opinion, where it stated, "We have considered the plaintiff's remaining contentions and find them unavailing."[301]

N.Y.S. 254, 256 (4 Dep't 1926); Lillianfeld v. Lichtenstein, 181 Misc.2d 571, 572, 694 N.Y.S.2d 600, 602, 1999 N.Y. Slip Op. 99352 (Sup. Ct., 1999); In re Johnson's Will, 46 Misc.2d 285, 287, 258 N.Y.S.2d 892, 895 (Sur., 1965).

[299] In the Appellant's Verified Complaint, the Appellant swore to damages resulting from reliance upon the breached contract. R. 312. Furthermore, In ¶6a(a) of his Verified Complaint, Appellant states that it was a purpose of the contract to develop "internet websites" (in the plural) as well as "other electronic means" to "advertise the defendants' [sic] products and to generate sales." R. 36. Added to this, ¶16 of the Complaint states that it "was the intent of the parties that *all* sales of Sonido products which result in income from *any source* by the *internet method* would generate income for Sonido and Mark T. Hynes by the internet method." R. 37 (emphasis added). Finally, the Plaintiff-Appellant stated in his Complaint, at ¶17, that the contract also concerned "licenses", which means that the Plaintiff-Appellant's Complaint has always presented sworn evidence that the intent of the parties was to include the revenue from royalties.

[300] Please see Brief for Plaintiff-Appellant at pp. i, 1, 7 – 11, and 22-28.

[301] Please see the Opinion of the Appellate Division, annexed as "Attachment B" to the Preliminary Appeal Statement in the present appeal.

Based on the above, it is respectfully submitted to this Honorable Court that a substantial Constitutional question is preserved on the record, extending the subject matter jurisdiction of this Honorable Court to the present matter.[302]

THIRD ISSUE:

DUE PROCESS OF LAW, GUARANTEED BY BOTH THE UNITED STATES CONSTITUTION AND STATE OF NEW YORK CONSTITUTION, DIRECTLY INVOLVES THE RIGHT OF THE PERSON AFFECTED BY LITIGATION TO BE HEARD BY TESTIMONY OR OTHERWISE, AND TO HAVE THE RIGHT OF CONTROVERTING BY PROOF EVERY MATERIAL FACT WHICH BEARS ON THE MATTER INVOLVED

Due process of law is fundamentally a Constitutional question, and as such, appeal lies to the Court of Appeals where a case involves a question of whether the judgment attained is the result of due process.[303] In this vein, it is readily established by Court of Appeals precedent that due process of law, guaranteed by both the United States Constitution and State of New York Constitution, directly involves the right of the person affected by litigation to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears on the matter involved.[304] "Due process of law" in judicial proceedings is thus law in its regular course of administration through courts of justice and in accordance with fundamental

---

[302] Valz v. Sheepshead Bay Bungalow Corporation, 249 N.Y. 122, 127, 163 N.E. 124, 132 (1928).

[303] Valz v. Sheepshead Bay Bungalow Corporation, 249 N.Y. 122, 127, 163 N.E. 124, 132 (1928).

[304] Ives v. South Buffalo Ry. Co., 201 N.Y. 271, 293, 94 N.E. 431,439, 34 L.R.A.N.S. 162, Am. Ann. Cas. 1912B, 156 (1911).

principles of free government[305] – it is thereby associated with the rule of law, as opposed to the caprices of individuals.[306] As such, it requires that the individuals who take part in governance, whether in an administrative capacity, a legislative capacity, or a judicial capacity, uphold the "law of the land" as it stands, and not interfere with, or otherwise hinder, the rule of law.[307]

FOURTH ISSUE:
THE APPELLANT WAS GIVEN NO OPPORTUNITY OF CONTROVERTING BY PROOF EVERY MATERIAL FACT WITH BEARING ON THE QUESTION IN THE MATTER INVOLVED – VIOLATING HIS CONSTITUTIONAL RIGHT TO DUE PROCESS

AS A MATERIAL QUESTION WAS NOT RAISED IN RESPONDENT'S ORIGINAL MOTION PAPERS, BUT WAS INSTEAD INTRODUCED FOR THE FIRST TIME IN ITS REPLY PAPERS, THE APPELLANT WAS GIVEN NO OPPORTUNITY OF CONTROVERTING BY PROOF EVERY MATERIAL FACT WITH BEARING ON THE QUESTION IN THE MATTER INVOLVED:

It is an established principle of due process that moving papers must give the non-moving party notice of the questions that will be raised on the motion, as the moving party must establish its entitlement within the moving papers as to every

---

[305] Loma Holding Corp. v. Cripple Bush Realty Corp., 147 Misc. 655, 657, 265 N.Y.S. 125, 128 (Sup. Ct.,1933); People ex rel. Lesser v. Hunt, 171 Misc. 640, 643 14 N.Y.S.2d 532, 536 (Sup. Ct.,1938); U.S. Const. .Amend. 14; N.Y. Const. art. 1, § 6.

[306] Gow v. Bingham, 57 Misc. 66, 107 N.Y.S. 1011, 1014 (Sup. Ct.,1907).

[307] See *id.*

element of a claim or defense.[308] In this way, for a court to grant a motion when the non-moving party has not adequately been placed on notice – particularly in circumstances where the issue in question has been raised for the first time in the reply papers – is a violation of due process.[309] This outcome is a natural result of the principle of law

---

[308] Ritt v. Lenox Hill Hosp., 182 A.D.2d 560, 561-562, 582 N.Y.S.2d 712, 713 (1st Dep't 1992), where the Appellate Division in and for the First Department states: "By making, for the first time in its reply, the contention that the medical record does not contain any indication of fetal distress, defendant has obviated the need for a response by plaintiff (CPLR 2214[b]); only when a defendant refutes "by specific factual reference the allegations of malpractice made by plaintiff" (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 326, 508 N.Y.S.2d 923, 501 N.E.2d 572) does the burden of going forward with the proof shift to the plaintiff "to produce evidentiary proof in admissible form establishing the existence of material questions of fact" (68 N.Y.2d at 326-327, 508 N.Y.S.2d 923, 501 N.E.2d 572, *supra*)." See also CPLR 3212(b), CPLR 2214(c), and Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), a 1986 determination of the U.S. Supreme Court suggesting that the resisting party need not come forward with proof to sustain its claim until the moving party has demonstrated some basic element missing from the claim.

[309] People v. Minota, 137 A.D.2d 837, 837, 525 N.Y.S.2d 300, 301 (2d Dep't 1988), citing State Farm Fire and Cas. Co. v. LiMauro, 103 A.D.2d 514, 521-22, 481 N.Y.S.2d 90, 95 (2d Dep't 1984), aff'd, 65 N.Y.2d 369, 492 N.Y.S.2d 534, 482 N.E.2d 13 (N.Y. 1985); Ressis v. Mactye, 98 A.D.2d 836, 837, 470 N.Y.S.2d 502, 504 (3d Dep't 1983). See also People v. Ford, 69 N.Y.2d 775, 777, 513 N.Y.S.2d 106, 107, 505 N.E.2d 615, 617 (1987); Voytek Technology, Inc. v. Rapid Access Consulting, Inc., 279 A.D.2d 470, 471, 719 N.Y.S.2d 112, 113, 2001 N.Y. Slip Op. 00236 (2d Dep't 2001); Klimis v. Lopez, 290 A.D.2d 538, 736 N.Y.S.2d 697, 697-698, 2002 N.Y. Slip Op. 00601 (2d Dep't 2002); Dannasch v. Bifulco, 184 A.D.2d 415, 416-417, 585 N.Y.S.2d 360, 362 (1st Dep't 1992); Levitz v. Robbins Music Corp., 17 A.D.2d 801, 801, 232 N.Y.S.2d 769, 770 -771 (1st Dep't 1962).

that a motion is limited to the issues raised on it.[310] It follows, therefore, that a judgment granted in violation of such procedure is violative of due process as well,[311] as it is violative of the established process of law.[312] Thus, it is respectfully submitted that, on at least two grounds, a case involving a grant of summary judgment based on issues that were raised for the first time in the reply papers falls within the subject matter jurisdiction of the Court of Appeals, and that such a case is thereby eligible for appeal as a matter of right.[313]

THE AFOREMENTIONED VIOLATION OF DUE PROCESS WAS EXACERBATED BY THE FACT (APPARENT ON THE RECORD) THAT THE TRIAL COURT JUDGE NARROWLY LIMITED THE SCOPE OF THE HEARING ON THE MOTION IN A WAY THAT PREVENTED THE APPELLANT FROM CONTROVERTING THE CONTENTIONS MADE BY THE RESPONDENT IN ITS REPLY PAPERS. FURTHERMORE, THE TRIAL COURT JUDGE DID NOT PERMIT THE APPELLANT TO INTRODUCE EVIDENCE DURING THE HEARING THAT CONTROVERTED THE MATERIAL QUESTIONS RAISED BY THE RESPONDENT FOR THE FIRST TIME IN RESPONDENT'S REPLY PAPERS:

---

[310] Marable v. Robinson, 102 Misc.2d 96, 99, 422, N.Y.S.2d 630, 633 (N.Y. City. Civ., 1979); CPLR 2218.

[311] Dannasch v. Bifulco, 184 A.D.2d 415, 416-417, 585 N.Y.S.2d 360, 362 (1st Dep't 1992); Ritt v. Lenox Hill Hosp., 182 A.D.2d 560, 561-562, 582 N.Y.S.2d 712, 713 (1st Dep't 1992); Lazar v. Nico Ind., 128 A.D.2d 408, 409-410, 512 N.Y.S.2d 693, 694 (1st Dep't 1987).

[312] Ives v. South Buffalo Ry. Co., 201 N.Y. 271, 292, 94 N.E. 431, 439, 34 L.R.A.N.S. 162, Am. Ann. Cas. 1912B, 156 (1911).

[313] Valz v. Sheepshead Bay Bungalow Corporation, 249 N.Y. 122, 127, 163 N.E. 124, 132 (1928).

The Trial Court Judge sought to limit the scope of the hearing to only one issue,[314] and despite conflicting interpretations of the contract being raised in both the answering and supporting papers on the motion,[315] as well as the pleadings,[316] the Trial Court produced an interpretation of the contract that it then used to direct its determination of the scope of the hearing.[317] The scope set by the Trail Court, which shows evidence of having been determined based on an issue that was introduced for the first time in the Respondent's reply papers,[318] was strictly enforced to the detriment of the of the Appellant, as the Appellant was repeatedly not allowed to pursue inquiry that would touch upon the material issue of whether the contract in question applied to all internet sales, or whether it was limited to those sales directly made over the

---

[314] R. 10.

[315] R. 295.

[316] As to an issue of fact being created by the pleadings, in ¶6a(a) of his Verified Complaint, Appellant states that it was a purpose of the contract to develop "internet websites" (in the plural) as well as "other electronic means" to "advertise the defendants' (sic) products and to generate sales." R. 36. Added to this, ¶16 of the Complaint states that it "was the intent of the parties that *all* sales of Sonido products which result in income from *any source* by the *internet method* would generate income for Sonido and Mark T. Hynes by the internet method." R. 37 (emphasis added). Finally, the Appellant stated in his Complaint, at ¶17, that the contract also concerned "licenses", which means that the Plaintiff-Appellant's Complaint has always presented sworn evidence that the intent of the parties was to include the revenue from royalties.

[317] R. 11 & 30.

[318] R. 10, 11, 14 – 16. Also, it should be noted that the issue of contract being limited to sales made directly by the Respondent over a website was not raised by the Respondent until it was done so for the first time in the reply papers. R. 295 – 296.

Respondents website, directly by the Respondent.[319] In this regard it should be noted that record preserves instances where the Trial Court prevented testimony that would favor the Appellant, as such would go beyond the narrow scope of the hearing set by the Trial Court[320] (something that directly interferes with a court's function, on a motion for summary judgment, of construing all evidence in the light most favorable to the non-moving party).[321] In one such instance, when a witness presented by the Respondent was equivocal as to an issue of material fact,[322] the Trial Court went as far as preventing any possibility of the witness admitting, through testimony, the material issue which the Appellant was seeking to illicit, when the Trial Judge himself interrupted the inquiry by flatly asserting the Respondent's position as conclusive.[323]

It is respectfully submitted to this Honorable Court that the above was a violation of the Appellant's due process, and that as such, it is a

---

[319] R. 11, 14 – 16, & 30. It should also be noted that the Trial Court stated that there was no question that Sonido music is sold over the Internet (a fact readily admitted during the proceedings), demonstrating said Court's refusal to entertain any evidence that the contract applied to all Internet sales. R. 16 – 18, 24, & 30. This itself raises an important issue of fact, because, if the Respondent was not in the business of selling music over the Internet (R. 295 – 296), but still managed to make Internet sales (R. 16 – 18, 24, & 30), the inference arose that the terms of the contract were defined by the kinds of Internet sales and business that the Respondent was actually involved in.

[320] R. 15 & 22.

[321] Weiss v. Garfield, 21 A.D.2d 156, 158, 249 N.Y.S.2d 458, 461 (3d Dep't 1964); CPLR 4401.

[322] Such raises one of many credibility questions.

[323] R. 22 & 24, & 29 – 30.

basis for the extension of this Honorable Court's subject matter jurisdiction to the present appeal.[324]

FIFTH ISSUE:
THE QUESTION OF THE APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS BEING VIOLATED BECAUSE SUMMARY JUDGMENT WAS GRANTED DESPITE THE RESPONDENT FAILING TO MEET ITS BURDEN ON THE MOTION – PARTICULARLY IN LIGHT OF THE FACT THAT THE DETERMINATIVE ISSUES DECIDED ON THE MOTION WERE PRESENTED FOR THE FIRST TIME IN THE RESPONDENT'S REPLY PAPERS – WAS ADEQUATELY PRESERVED FOR APPEAL

The question of the Appellant's Constitutional right to due process being violated because summary judgment was granted despite the Respondent failing to meet its burden on the motion – particularly in light of the fact that the determinative issues decided on the motion were presented for the first time in the Respondent's reply papers – is preserved on the record at R.37, R. 296, in the Brief for Plaintiff-Appellant at pp.14 and 22 – 23, in the Reply Brief for Plaintiff-Appellant at pp.1 – 7 (particularly Footnote 15 on p.4).

Because such was preserved for appeal, and as such was a predominant focus of the Appellant's appeal before the Appellate Division,[325] it is respectfully submitted that the question of a judgment being secured upon the violation of due

---

[324] Valz v. Sheepshead Bay Bungalow Corporation, 249 N.Y. 122, 127, 163 N.E. 124, 132 (1928).

[325] R.37, R. 296; Brief for Plaintiff-Appellant at pp.14 and 22 – 23; Reply Brief for Plaintiff-Appellant at pp.1 – 7.

process is preserved on the record, warranting appeal to the Court of Apples.[326]

CONCLUSION

Given the proof provided in the comments and arguments above, it is respectfully submitted that the present appeal presents substantial Constitutional questions, as it directly concerns Constitutional questions that this Honorable Court has already held to be within the subject matter jurisdiction of this Honorable Court.[327]

Dated: Brooklyn, New York
September 10, 2008

Respectfully submitted,

s/ Joshua Hernandez, Esq.
By: Joshua Hernandez, Esq., *of Counsel*
LAW OFFICES OF ANATTA LEVINSKY, P.C.
Attorneys for Appellant
6924 Bay Parkway
Brooklyn, New York
Telephone Number: (718) 837-9700
Facsimile Number: (718) 837-5555

To: CLERK OF THE COURT OF APPEALS
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207-1095

---

[326] Valz v. Sheepshead Bay Bungalow Corporation, 249 N.Y. 122, 127, 163 N.E. 124, 132 (1928).
[327] See *id.*

THE LAW OFFICES OF STUART A. JACKSON, P.C.
Attn: Stuart Alan Jackson, Esq.
Christelle Clement, Esq., *of Counsel*
Attorneys for Defendant-Respondent
70 East 55th Street
New York, New York 10022
Telephone Number: (212) 755-0500
Facsimile Number: (212) 755-2140

APPENDIX P

State of New York
Court of Appeals

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207

August 26, 2008

Law Offices of Anatta Levinsky PC
Attn: Joshua Hernandez, Esq.
6924 Bay Parkway
Brooklyn, NY 11204

Re: Mark Hynes v. Sonido, Inc.
Motion No. 08/1005

Dear Mr. Hernandez:

I acknowledge receipt of your preliminary appeal statement in the above matter.

Because you have simultaneously moved for leave to appeal and appealed as of right, the Court of Appeals, on its own motion, will consider its subject matter jurisdiction with respect to whether a substantial constitutional question is directly involved to support the appeal taken as of right (CPLR 5601[b]).

You and your adversary are invited to submit comments in writing on the issue of subject matter jurisdiction. Such comments must be served and filed within 10 days after this letter's date.

Very truly yours,

s/ Stuart M. Cohen

Stuart M. Cohen

HD:mg
cc: Christille Clement, Esq.

APPENDIX Q

Mark T. Hynes
117 Kent Road
Valley Stream, New York 11580

Chief Judge Kaye
State of New York Court of Appeals
20 Eagle Street, Albany, New York 12207-1095

Dear Chief Justice Kaye,

I am writing to you with a deep feeling of betrayal by the New York legal system. It is my intention simply to notify this honorable Court that my Constitutional and civil rights as a citizen have been violated, and that my property stolen.

In 1994 I met Jerry Masucci, the attorney, after the Microsoft Developers Network introduced us. I entered into an agreement with Jerry for the development of software for his existing business Sonido Inc. He was the sole owner of Sonido, and so he was the sole owner of property that was ultimately taken from me. What follows sums up everything that has happened to deprive me of my property.

In late 1994, I made a verbal agreement with Jerry which gave me 10 percent of any sales that came to Sonido by the Internet. The reason for this was that, according to our original agreement, Jerry had paid me $10,000 in early 1994 toward the production of a program that I wrote and was being used by Jerry to calculated and itemize all his existing sales, for paying out royalties to artists, authors, publishers, producers and collectors on any type of sale. The agreement, made in late 1994, made us partners in a way, and I ended up showing

the final online prototype to Jerry in January 1997. Jerry was very interested in this program and its obvious ramifications to his being able to control his business virtually and securely – it would allow him to control all the methods he was then using for selling, and would be expanded to include a global identification of those sales based on licensing and contracts. He was concerned that he was losing money through piracy and manufacturing discrepancies. We were not sure as to how the future of the music over the Internet was going to be collected, so he made the contract using the word "all" sales. This was a way to protect me – so I thought.

On February 10th, 1997 Jerry put our agreement in writing. I then proceeded to invest my money, and that of my mother, who was then 75 years old (and who is now 85 years old). Bank withdrawals are attached by the way. I borrowed a total of $39,000 dollars from her retirement funds. I explaining to her that since I received the signed contract, there was no way anyone could steal her retirement money – boy was wrong. I then purchased source codes and other programs and equipment to fulfill me and Jerry's combined dream. We saw this as and payment to me of Internet rights, working together in a joint project, and I had gotten paid in advance by being given that piece of the Internet in the contract.

In December 1997, Jerry died and the new owners threw me out. I traveled to Argentina two times to find out why my friend had died. My findings we're disturbing. I met with a man who stated that he was the one that found Jerry at a clinic outside the city alone eyes open and on a gurney with no sheet and a large cut in his stomach area. This does not match the report that was filed here as to a cause of death. It is simply disturbing to me.

I sought out a lawyer and started a law suit. Then, Sonido produced a fraudulent document against me, but thanks to the only truthful person I have met in this whole court system, Marion Lewis (a Judicial Hearing Officer), the fraud was exposed. I must say thank you to her for just doing the right thing and exposing their fraud. God bless you.

I then went to court after nine years of having my case open, and Judge Gammerman admitted that he also owned publishing rights and added words and meanings to the contract that were wholly not true – like direct sales over a non-existing web site and only directly by a company that sold all of my assets to Virgin records.

After appealing to the First Department, the Court said something I consider almost criminal – that I had no right to royalties whatsoever, and that I had no avail to any law.

Now I stand before this Court and have been told that I have no Constitutional rights and that I have no basis for an appeal – even though I didn't have my day in court before a jury. You all have assassinated my work, and my dreams, and my rights, shame on you.

Well, all I have to say is that I will now continue to repay my mom this debt, for I am an honorable man – not like those whom do not follow the very laws that they swore to uphold. It'll continue to come out of my pocket, instead of the pockets of the people who took that money and then kicked me out on the street. This truly makes me sad, and I have lost faith in you all...and this system.

To me, this Court is acting in a feudalistic way – taking the side of the rich and powerful just because it keeps the status quo. I have no doubt that some of you may have been paid off or threatened by these evil people whom I believe killed my friend and stole

my contract – using the very Court System I once believed in. For you that are truly scared for whatever reason, I forgive you. But, for those of you that have manipulated the system to your profit I can only hope that God is watching. My biggest problem with all of this is not that I have lost my mother's money and any chance of getting the money that was promised to me, but it's the question of what I say to my small children when they ask me what it means to be an American and if we should trust the rule of law.

Sincerely,

s/ Mark T. Hynes
Mark T. Hynes

APPENDIX R

To: The Clerk of The court [sic] November 21, 2008
New York State court [sic] of Appeals

Dear Mr. Stuart M. Cohen,

I wish to thank you for your letter. Dated November 19th 2008. I finished writing the previous letters sent to the Justices on November 15th 2008.
Also I have attached a copy of the receipt of the copy of the same letter that I sent to the opposing counsel. I respectfully request that you notify the Justices that I did not do anything underhanded. I was somewhat familiar with court procedure in that I was the one that had acted as Pro Se on this case for a few months and the Clerk of the court [sic] told me that if I do anything I was to send a copy to the [sic] opposing counsel as well as the court I am asking leave from.
I do not want this honorable court [sic] to think that I would seek to gain Justice though anything underhanded. I will also send a copy of this letter, to the law offices of Mr. Stuart A. Jackson.

I wish you all a Nice Holiday season and [sic]

Thank you

s/ Mark T. Hynes
Mark T. Hynes

cc: Stuart A Jackson
Joshua Hernandez